TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 251.

GREEN COUNTY, KENTUCKY, PETITIONER,

vs.

MARY ANN QUERLAN, EXECUTRIX OF THE WILL AND TESTAMENT OF LEONARD S. [illegible], DECEASED.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

(21,117.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 351.

GREEN COUNTY, KENTUCKY, PETITIONER,

vs.

MARY AMIS QUINLAN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF LEONARD Q. QUINLAN, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 1440.

United States Circuit Court of Appeals, Sixth Circuit.

MARY AMIS QUINLAN, Executrix of the Last Will and Testament of Leonard G. Quinlan, Deceased, Plaintiff in Error,
vs.
GREEN COUNTY, KENTUCKY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Kentucky.

Record.

Original Transcript Filed May 31, 1905.

Filed Aug. 14, 1905.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

MARY AMIS QUINLAN, Executrix of the Last Will and Testament of Leonard G. Quinlan, Deceased, Plaintiff in Error,
vs.
GREEN COUNTY, KENTUCKY, Defendant in Error.

Stipulation as to the Parts of the Record to be Printed.

The plaintiff in error, Mary Amis Quinlan, Executrix of the last will and testament of Leonard G. Quinlan, deceased, and the defendant in error, Green county, hereby agree that the entire record which has been copied for this court in this case is not necessary for the consideration of the writ of error herein, and that the parts of the record which are necessary or material for the consideration of said writ of error, and which should be included in the printed record are what remain after omitting from said record the following parts, to-wit:

Omit the summons and marshal's return thereon. Print the introductory part of the petition, the first paragraphs and the prayer, but omit from said petition paragraphs numbered from two to ninety-two inclusive; and in lieu of said paragraphs of the petition print the following statement.

The paragraphs of the petition in this case numbered from two to ninety-two inclusive are in the same form and terms as the first paragraph thereof, and said paragraphs declare upon bonds executed in the same form and terms, bearing the same date, payable at the same time, and differing from the bond declared on in said first paragraph

of the petition, only in the serial number and value or amount thereby agreed to be paid, and said paragraphs also declare upon coupons executed in the same form and terms, and bearing the same date and differing from the coupons declared on in
2 said first paragraph, only in the serial number, and in the amount or face value of said coupons, and the dates when the same were made payable, and said paragraphs No-. 2 to 92 inclusive also contain the same averments as said first paragraph as to the execution, delivery, terms, interest, presentation and demand for payment, refusal of payment and subsisting indebtedness. This statement also shows as to each paragraph the serial number of the bond declared on therein, and the amount or face value of such bond, and as to each coupon declared on therein, its amount or face value, and the date when the same was made payable, as follows:

Par. 2. Bond No. 39, $100.00, coupons $3.00 each, payable respectively on the first days of April and October, in the years 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, and April 1, 1891.

Par. 3. Bond No. 72, $100.00 coupons $3.00 each, payable respectively on the first days of April and October, in the years 1879 to 1890 inclusive, and April 1, 1891.

Par. 4. Bond No. 92, $100.00, coupons $3.00 each, payable respectively on the first days of April and October, in the years 1879 to 1890 inclusive, and April 1, 1891.

Par. 5. Bond No. 120, $100.00, coupons $3.00 each, payable respectively on the first days of April and October, in the years 1879 to 1890 inclusive, and April 1, 1891.

Par. 6. Bond No. 136, $100.00, coupons $3.00 each, payable respectively on the first days of April and October, in the years 1879 to 1890 inclusive, and April 1, 1891.

Par. 7. Bond No. 153, $100.00, coupons $3.00 each payable respectively on the first days of April and October, in the years 1879 to 1890 inclusive, and April 1, 1891.

Par. 8. Bond No. 13, $500.00, coupons $15.00 each payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and April 1, 1891.

Par. 9. Bond No. 16, $500.00, coupons $15.00 each payable respectively on the first days of April and October in the years 1884 to 1890 inclusive, and April 1, 1891.

Par. 10. Bond No. 26, $500, coupons $15.00 each, payable rerespectively on the first days of April and October, in the years 1884 to 1890 inclusive, and April 1, 1891.

Par. 11. Bond No. 36, $500, coupons $15.00 each payable respectively on the first days of April and October, in the years 1884 to 1890 inclusive, and April 1, 1891.

Par. 12. Bond No. 38, $500, coupons $15.00 each payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and April 1, 1891.

3 Par 13. Bond No. 42, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1884 to 1890 inclusive, and the 1st day of April, 1891.

Par. 14. Bond No. 43, $500, coupons $15.00 each payable respectively on the first days of April and October, in the years 1884 to 1890 inclusive, and the first day of April 1, 1891.

Par. 15. Bond No. 44, $500, coupons $15.00 each payable respectively on the first days of April and October, in the years 1880 to 1890 inclusive and the first day of April, 1891.

Par. 16. Bond No. 70, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 17. Bond No. 71, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1880 to 1890 inclusive, and the first day of April, 1891.

Par. 18. Bond No. 77, $500, coupons $15.00 each, payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 19. Bond No. 89, $500, coupons $15.00 each, payable respectively on the first of October, 1879, and the first days of April and October in the years 1880 to 1890 inclusive and April 1, 1891.

Par. 20. Bond No. 91, $500, coupons $15.00 each, payable respectively on the first day of October, 1879, and the first days of April and October in the years 1880 to 1890 inclusive, and first day of April, 1891.

Par. 21. Bond No. 119, $500, coupons $15.00 each, payable respectively on the first day of October, 1878, and the first days of April and October 1879 to 1890 inclusive, and April 1, 1891.

Par. 22. Bond No. 127, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and April 1, 1891.

Par. 23. Bond No. 132, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive and first day of April, 1891.

Par. 24. Bond No. 133, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

4 Par. 25. Bond No. 142, $500, coupons $15.00 each, payable respectively on the first days of April and October in the years 1884 to 1890 inclusive, and first day of April, 1891.

Par. 26. Bond No. 144, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and first day of April, 1891.

Par. 27. Bond No. 163, $500, coupons $15.00 each, payable respectively on the first day of October 1879, and the first days of April and October in the years 1880 to 1890 inclusive and first day of April, 1891.

Par. 28. Bond No. 172, $500, coupons $15.00 each, payable respectively on the 1st days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 29. Bond No. 177, $500, coupons $15.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 30. Bond No. 16, $1000, coupons $30.00 each, payable

respectively on the first day of October 1881 and the first days of April and October in the years 1882 to 1890 inclusive, and the first day of April, 1891.

Par. 31. Bond No. 19, $1,000, coupons $30.00 each, payable respectively on the first days of April and October, in the years 1884 to 1890 inclusive, and the first day of April, 1891.

Par. 32. Bond No. 20, 1000, coupons $30.00 each, payable respectively on the first days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 33. Bond No. 23, $1,000, coupons $30.00 each, payable respectibe- on the first days of April and October in the years 1884 to 1890 inclusive, and the first day of April, 1891.

Par. 34. Bond No. 26, $1,000, coupons $30.00 each, payable respectively on the first days of April and October, in the years 1880 to 1890 inclusive and the first day of April, 1891.

Par. 35. Bond No. 30, $1,000, coupons $30.00 each, payable respectively on he first days of April and October, in the years 1880 to 1890 i lusive and the first day of April, 1891.

Par. 36. Bo No. 31, $1,000, coupons $30.00 each, payable respectively on he first days of April and October, in the years 1881 to 1890 inclusive, and the first day of April, 1891.

5 Par. 37. Bond No. 36, $1,000, coupons $30.00 each payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par 38. Bond No. 37, $1,000, coupons $30.00 each, payable respectively on the first day of October, 1880, and the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 39. Bond No. 54, $1,000, coupons $30.00 each, payable respectively on the first days of April and October in the years 1880 to 1890 inclusive and the first day of April, 1891.

Par. 40. Bond No. 55, $1,000, coupons $30.00 each payable respectively on the first day of April 1880 to 1890 inclusive and the first day of April, 1891.

Par. 41. Bond No. 68, $1,000, coupons $30.00 each, payable respectively on the first day of October, 1879, and the first days of April and October, 1880 to 1890 inclusive, and the first day of April, 1891.

Par. 42. Bond No. 95, $1,000, coupons $30.00 each, payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 43. Bond No. 108, $1,000, coupons $30.00 each, payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 44. Bond No. 121, $1,000, coupons $30.00 each, payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 45. Bond No. 124, $1,000, coupons $30.00 each, payable respectively on the first days of April and October in the years 1881 to 1890 inclusive, and the first day of April, 1891.

Par. 46. Six coupons No. 68, $3.00 each, payable respectively on the first days of April and October in the years 1884, 1885, 1886.

Par. 47. Six coupons No. 69, $3.00 each, payable respectively on the first days of April and October in the years 1884, 1885, 1886.

Par. 48. Six coupons No. 79, $3.00 each payable respectively on the first days of April and October in the years 1884, 1885, 1886.

Par. 49. Six coupons No. 98, $3.00 each, payable respectively on the first days of April and October in the years 1884, 1885, 1886.

6 Par. 50. Six coupons No. 117, $3.00 each payable respectively on the first days of April and October in the years 1884, 1885, 1886.

Par. 51. Six coupons No. 122, $3.00 each payable respectively on the first days of April and October in the years 1884, 1885, 1886.

Par. 52. Two coupons No. 125, $3.00 each, payable respectively on the first days of April and October, in the year 1884.

Par 53. Two coupons No. 128, $3.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 54. Six coupons No. 146, $3.00 each, payable respectively on the first days of April and October, in the years 1884, 1885 and 1886.

Par. 55. Six coupons No. 148, $3.00 each, payable respectively on the first days of April and October, in the years 1884, 1885 and 1886.

Par. 56. Two coupons No. 184, $3.00 each, payable on the first days of April and October in the year 1884.

Par. 57. Two coupons No. 211, $3.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 58. Two coupons No. 213, $3.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 59. Three coupons No. 47, $15.00 each, payable respectively on the first days of April and October, 1884 and 1885.

Par. 60. Two coupons No. 49, $15.00 each, payable respectively on the first days of April and October in the year 1884.

Par. 61. Two coupons No. 50, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 62. Two coupons No. 51, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 63. Two coupons No. 72, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 64. Two coupons No. 73, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 65. Two coupons No. 81, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

7 Par. 66. Two coupons No. 87, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 67. Two coupons No. 88, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 68. Two coupons No. 90, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 69. Two coupons No. 93, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 70. Six coupons No. 114, $15.00 each, payable respectively on the first days of April and October, in the years 1884, 1885 and 1886.

Par. 71. Six coupons No. 115, $15.00 each, payable respectively on the first days of April and October, in the years, 1884, 1885 and 1886.

Par. 72. Two coupons No. 134, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 73. Two coupons No. 135, $15.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 74. Six coupons No. 143, $15.00 each, payable respectively on the first days of April and October, in the years 1884, 1885 and 1886.

Par. 75. Three coupons No. 155, $15.00 each, payable respectively on the first days of April and October, in the year 1884 and the first day of April, 1885.

Par. 76. Three coupons No. 156, $15.00 each, payable respectively on the first days of April and October, 1884 and first day of April, 1885.

Par. 77. Ten coupons No. 14, $30.00 each payable respectively on the first days of April and October, in the years 1884, 1885, 1886, 1887 and 1888.

Par. 78. Two coupons No. 24, $30.00 each payable respectively on the first days of April and October, in the year 1884.

Par. 79. Two coupons No. 32, $30.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 80. Two coupons No. 34 $30.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 81. Five coupons No. 35, $30.00 each, payable respectively on the first days of April and October in the years 1879 and 1880 and the first day of April, 1881.

8 Par. 82. Ten coupons No. 44, $30.00 each, payable respectively on the first days of April and October in the years 1885, 1886, 1887, and 1888.

Par. 83. Two coupons No. 45, $30.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 84. Two coupons No. 75, $30.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 85. Two coupons No. 76, $30.00 each, payable respectively on the first days of April and October, in the year 1884.

Par. 86. Two coupons No. 77, $30.00 each, payable respectively on the first days of April and October in the year 1884.

Par. 87. Two coupons No. 78, $30.00 each, payable respectively on the first days of April and October in the year 1884.

Par. 88. Six coupons No. 79, $30.00 each, payable respectively on the first days of April and October in the years 1884, 1885 and 1886.

Par. 89. Two coupons No. 80, $30.00 each, payable respectively on the first days of April and October in the year 1884.

Par. 90. Two coupons No. 81, $30.00 each, payable respectively on the first days of April and October in the year 1884.

Par. 91. Five coupons No. 84, $15.00 each, payable respectively on the first days of April and October in the years 1884, 1885 and 1886.

Par. 92. Five coupons No. 97, $15.00 each, payable respectively on the first days of April and October in the years 1884, 1885 and 1886.

The defendant, Green County, enters into the foregoing stipulation solely for the purpose of saving the cost of printing the petition in full, and reserves all other rights in the case.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Attys. for Green County.
EDMUND F. TRABUE,
GEORGE Du RELLE,
JOHN J. McHENRY,
Attys. for Mrs. Quinlin.

No. 1440. Stipulation for printing record. Filed June 12, 1905. Frank O. Loveland, Clerk.

9 Proceedings of the Circuit Court of the United States for the Western District of Kentucky at a regular Term Begun and Held at the Federal Court Hall, in the City of Louisville, on Monday, October 10, A. D. 1904.

Present: Honorable Walter Evans, sitting as Circuit Judge.

L. G. QUINLAN
vs.
GREEN COUNTY, KENTUCKY.

Be it remembered that heretofore, to-wit, on the 28th day of March, A. D. 1899, came the plaintiff herein, by John Barret his attorney and filed in the clerk's office his petition against the above named defendant, which said petition is as follows:

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, KENTUCKY, Defendant.

Petition.

The plaintiff, L. G. Quinlan, states that he is a citizen of the State of New York; that the defendant is a county or political subdivision of the State of Kentucky.

That by an act of the General Assembly of the Commonwealth of Kentucky approved February 24th 1869, entitled "An Act to in-

corporate the Cumberland and Ohio Railroad Company" the defendant the county of Green was empowered to subscribe such amount of stock in the said Cumberland and Ohio Railroad Company as its county court might direct and to issue its bonds in payment thereof; said bonds to be made payable to bearer with coupons attached for the payment of interest. But before the said subscription became valid the county court was directed to submit the question of making the same to a vote of the qualified voters of the county at an election to be held under the direction of the county court and in the event a majority of the votes cast at such election were in favor of such subscription then it was *the* made the duty of the said County Court to make the same and to issue the county bonds as aforesaid.

Plaintiff states that thereafter the county court of Green County ordered an election to be held by the qualified voters of the county to determine the question of subscribing on behalf of the county for two hundred and fifty thousand dollars ($250,000.00) of the capital stock of said Cumberland and Ohio Railroad Company and at an election so held a majority of the — cast being on favor of said subscription the County Court did make the same and did in payment thereof on the 1st day of April, 1871, issue the bonds of the county to the amount of the aggregate of two hundred and fifty thousand dollars, of the following denominations to-wit: One thousand dollars, five hundred dollars and one hundred dollars; each of said bonds were payable to bearer, bore interest at the rate of six per cent. per annum matured in twenty years. To each of said bonds were attached coupons for the payment of interest signed by the County Clerk, by each of which bonds and coupons the county of Green promises and agrees to pay to the bearer the amount and at the time and place therein specified.

Plaintiff states that he is the holder and owner of the following bonds and coupons, of the following amounts and dates of maturities, to-wit:

Par. —. That the said county did by its said officers, its agents executed and delivered for a valuable consideration, its certain bond No. 35, in the sum of one hundred dollars, dated April 1, 1871, A. D. and payable twenty years after the date thereof, with interest at the rate of six per cent. per annum thereon from maturity until paid; said bond by its terms being payable at the Bank of America in the City of New York, State of New York; and did also deliver coupon bonds of even date therewith for the sum of three dollars each, also payable at said Bank and which coupons became due and payable on the 1st day of April, 1884, the 1st day of October, 1884, the 1st day of April, 1885, the 1st day of October, 1885, the 1st day of April, 1886, the 1st day of October, 1886, the 1st day of April, 1887, the 1st day of October, 1887, the 1st day of April, 1888, the 1st day of October, 1888, the 1st day of April, 1889, the 1st day of October, 1889, the 1st day of April, 1890, the 1st day of October, 1890, the 1st day of April, 1891, respectively, and by the execution and delivery of said bond and said coupons, the said defendant expressly agreed and promised to pay the same;

although said bond and coupons and each of them were duly presented at the date of their respective maturities at the Bank of America, in the City of New York, State of New York, where the same were by their terms made payable and payment thereof was duly demanded which was refused because of the want of funds of the defendant to pay the same. Said bonds and coupons are past due and no part thereof has been paid, although defendant has been often requested to pay the same, has wholly failed and refuses to pay said bond and coupons and the same are still due and owing.

Wherefore, the plaintiff prays judgment against said defendant for each of the bonds and coupons in the several amounts as above set forth amounting in the aggregate to the sum of forty-seven thousand five hundred and nine dollars ($47,509.00) with interest at the rate of six per cent. per annum on the several sums from the date they became due and payable, for his costs herein incurred and expended and for all other proper relief.

JOHN BARRET,
Att'y for Plaintiff.

One of each of the said bonds and coupons above referred to are as follows:

No. 35. UNITED STATES OF AMERICA, $100.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date, the County of Green in the State of Kentucky, will pay the holder of this Bond the sum of One Hundred Dollars with interest thereon at the rate of Six Per Cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached; the Principal and Interest being payable at the Bank of America in the City of New York.

In testimony whereof, the Judge of said County of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the County Clerk, who has also signed the coupons hereto attached.

T. R. BARNETT, *Judge.*

[SEAL.] D. T. TOWLES, *Clerk.*

12 NOTE.—[$100 printed over face of above.]

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of April, 1891, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of October, 1890, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of April, 1890, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

NOTE.—Numbers in brackets [40] preceding each coupon, are printed over face of same.

[40]

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of October, 1889, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

[39]

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of October, 1890, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

[38]

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of April, 1890, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

13 [37]

The County of Green, in the State of Kentucky, will pay three dollars to bearer at the Bank of America, in the City of New York, on the first day of October, 1889, being the semi-annual interest on county bond No. 35, dated the first day of April, A. D. 1871. $3.

D. T. TOWLES, *Clerk.*

[36]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1889, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[35]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1888, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[34]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1888, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[33]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York on the first day of October, 1887, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[32]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1887, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

14 [31]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1886, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[30]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1886, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[29]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1885, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[28]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1885, being the semi annual interest on county bond No. 35, dated the first day of April, A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[27]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1884, being the semi annual interest on county bond No. 35 dated the first day of April A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

[26]

The county of Green in the State of Kentucky will pay three dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1884, being the semi annual interest on county bond No. 35, dated the first day of April, A. D., 1871. $3.

D. T. TOWLES, *Clerk.*

15 Endorsed on back as follows: County of Green, State of Kentucky, $100 six per cent. interest bond No. 35, April and October. Filed Oct. 1, 1894, Thos. Speed, Clerk. Filed Aug. 30, 1895, Thos. Speed, Clerk. Filed March 28, 1899, Thos. Speed, Clerk.

No. 13. UNITED STATES OF AMERICA, $500.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date the County of Green, in the State of Kentucky, will pay the holder of this bond the sum of five hundred dollars, with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the bank of America, in the city of New York.

In testimony whereof, the Judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D., 1871, and caused the same to be attested by the County Clerk who has also signed the coupons hereto attached.

[SEAL.] D. T. TOWLES, *Clerk.*
T. R. BARNETT, *Judge.*

NOTE.—[$500 printed over face of above.]

NOTE.—Numbers in brackets [40] preceding each coupon, are printed over face of same.

[40]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1891, being the semi annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk.*

[39]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America in the city of New York, on the first day of October, 1890, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

16 [38]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America in the city of New York, on the first day of April, 1890, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[37]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America in the city of New York, on the first day of October, 1889, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[36]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America in the city of New York, on the first day of April, 1889, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[35]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America in the city of New York, on the first day of October, 1888, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[34]

The county of Green, in the State of Kentucky will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1888, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[33]

The county of Green, in the State of Kentucky will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1887, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

17 [32]

The county of Green, in the State of Kentucky will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1887, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[31]

The county of Green, in the State of Kentucky will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1886, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[30]

The county of Green, in the State of Kentucky will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1886, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[29]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1885, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[28]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1885, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[27]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1884, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

18 [26]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1884, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk*.

[25]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1883, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk.*

[24]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1883, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15

D. T. TOWLES, *Clerk.*

[23]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1882, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk.*

[22]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1882, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk.*

[21]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the City of New York, on the first day of October, 1881, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. $15.

D. T. TOWLES, *Clerk.*

19 [20]

The county of Green, in the State of Kentucky, will pay fifteen dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1881, being the semi-annual interest on county bond No. 13, dated the first day of April, A. D., 1871. 15.

D. T. TOWLES, *Clerk.*

(Endorsed as follows:) County of Green, State of Kentucky, $500 six per cent. interest bond, No. 13, April and October. Filed Oct. 1, 1894, Thos. Speed, clerk. Filed Aug. 30, 1895, Thos. Speed, clerk. Filed March 28, 1899, Thos. Speed, clerk.

No. 16. UNITED STATES OF AMERICA. $1,000.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date the County of Green in the State of Kentucky, will pay the holder of this bond the sum of one thousand dollars with interest thereon at the rate of six per cent. per annum payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America in the City of New York.

In testimony whereof the judge of said county of Green has hereunto set his hand and affixed the seal of said county on the first day of April, A. D., 1871, and caused the same to be attested by the county clerk who has also signed the coupons hereto attached.

[SEAL.] T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*

NOTE.—[$1,000 printed over face of above.]

NOTE.—Numbers in brackets [40] preceding each coupon are printed over face of same.

[40]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1891, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[39]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1890, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[38]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1890, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[37]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1889, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[36]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1889, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[35]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1888, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[34]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New
21 York, on the first day of April, 1888, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D. 1871. $30.

D. T. TOWLES, *Clerk.*

[33]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1887, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[32]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1887, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[31]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1886, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30

D. T. TOWLES, *Clerk.*

[30]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York,

on the first day of April, 1886, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[29]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1885, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D. 1871. $30.

D. T. TOWLES, *Clerk*

[28]

The county of Green, in the State of Kentucky, will pay
22 thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1885, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D. 1871. $30.

D. T. TOWLES, *Clerk.*

[27]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1884, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[26]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1884, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[25]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1883, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[24]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of April, 1883, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[23]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1882, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D., 1871. $30.

D. T. TOWLES, *Clerk.*

[22]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New
23 York, on the first day of April, 1882, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D. 1871. $30.

D. T. TOWLES, *Clerk.*

[21]

The county of Green, in the State of Kentucky, will pay thirty dollars to bearer at the Bank of America, in the city of New York, on the first day of October, 1881, being the semi-annual interest on county bond No. 16, dated the first day of April, A. D. 1871. $30.

D. T. TOWLES, *Clerk.*

Endorsed on back as follows: County of Green, State of Kentucky, $1 000, six per cent. interest bond No. 16, April and October. Filed March 28, 1899. Thos. Speed, Clerk.

And on the 31st day of October, 1899, came the defendant by Ernest Macpherson, its attorney, and filed its plea in abatement herein, as follows:

United States Circuit Court, District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Plea in Abatement.

The defendant, Green County, by protestation not confessing or acknowledging all or any part of the matters or things in said petition mentioned to be true in such manner and form as the same are set forth herein and alleged, prays judgment of the writ herein and in said petition and that the same be quashed and dismissed, because defendant says that the plaintiff, J. G. Quinlan, has acquired the bonds and coupons and causes of action which he seeks herein to enforce solely for the purpose of collecting such bonds and coupons in the Federal Courts, and more especially in this Honorable Court, under an agreement to pay back a certain proportion of the net proceeds of the collection of any judgment he might obtain

herein to his assignors who are the real holders and owners
24 of said bonds and coupons, and who are residents and citizens of the State of Kentucky, and can not and could not sue on said bonds or coupons or either in this or any other Federal Court. Defendant says it is informed, believes and charges that the bonds and coupons in the petition mentioned are owned by various persons whose names are unknown to the defendant, residents and citizens of Kentucky, who have formed a syndicate or combination for the purpose of pooling their interests and by a fictitious and pretended assignment to plaintiff Quinlan, in fraud of the act of Congress in such cases made and provided, and in fraud of the jurisdiction of this court, have instituted this action in the name of said plaintiff herein, who is not the real party in interest, and defendant says that said L. G. Quinlan is not the real owner of said bond or coupons or either or any of them mentioned in said petition; that this suit has been instituted with said Quinlan merely as a nominal plaintiff in this court, wrongfully and in violation of the law and of the rights of this defendant. And defendant, Green County, further says that each and all the bonds and coupons herein sued on as belonging to the plaintiff Quinlan, are part of the bonds and coupons that were heretofore sued on in this Honorable Court by one Herman H. Heaton, a citizen of Indiana, who was himself not the owner of the bonds or coupons by him sued on. Said suit was numbered in this court number —. And upon proper plea in abatement filed in said action of Herman H. Heaton against Green County, showing that he was merely a fictitious plaintiff and not the owner of said bonds, said action was dismissed; and defendant says that thereafter each and all the bonds and coupons herein sued on, were sued on in this Honorable Court by one Samuel W. Simmons, claiming to be the owner thereof, and a citizen and resident of the State of Texas, and in said action of said Simmons against this defendant, which was numbered in this court number — upon proper plea in abatement filed in said action and upon issue joined thereon and proof taken, the said Simmons testified and swore that he was the lawful owner and holder of said bonds and coupons, part of which are herein sued on; but this Honorable Court upon full hearing, sustained the plea of this defendant, and dismissed said action of said Simmons against this defendant because and for that the said Simmons had fraudulently acquired the ownership of said bonds for the purpose of bringing suit in this Honorable Court. And defendant is informed and states that the same parties who have for a long time owned said bonds and coupons,
25 and who are residents of the State of Kentucky now again seek, although themselves the real owners of the bonds and coupons in the petition mentioned, to harass and annoy this defendant, Green County, in this action through the plaintiff L. G. Quinlan, who this defendant is informed, believes and charges is not the owner of any of said bonds or coupons, and defendant further says that the suit of Heaton hereinbefore mentioned, against this defendant, and the suit of Simmons heretofore mentioned against this defendant, and this suit, is, are and each of them were brought by the same attorney, whose name is signed to the petition

in this case. And defendant further says that the plaintiff in this case was induced and first applied to to bring this suit, either by said same attorney or by a broker of this city who is also interested in Green County bonds and coupons, which broker is a brother-in-law of the said plaintiff, and that said plaintiff well knew when he obtained the fictitious title aforesaid, or any title he has, that said bonds were not salable upon the market, having been repudiated by said county, and that nevertheless, he authorized or consented to the bringing of this suit in his name against this defendant for the benefit of others and in a matter in which he had no interest except formal and fictitious, and for the purpose of giving a color of jurisdiction to this Honorable Court, all which matters and things the said defendant, Green County, avers to be true and pleads the same to the said petition, and humbly prays judgment of this Honorable Court whether it ought to be compelled to make any further or other answer to the petition herein, and that same may be quashed and dismissed.

D. T. TOWLES,
Judge Green County Court, State of Kentucky, County of Green.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Att'ys for Def'd't.

D. T. Towles, Judge of the Green County Court states that he believes that the statements contained in this plea in abatement are true.

D. T. TOWLES,
J. G. C. C.

Subscribed and sworn to before me by D. T. Towles, Judge of the County Court of Green County, this 2d day of October, 1899.

[SEAL.] P. F. MARSHALL,
Clerk Green Co. Court.

26 And on the 18th day of November, 1899, the following order was entered:

Now comes the plaintiff J. G. Quinlan, by attorney, and moves the court to strike from the plea in abatement herein the following words and phrases, to-wit:

"And defendant Green County, further says that each and all of the bonds and coupons herein sued on as belonging to plaintiff Quinlan are part of the bonds and coupons that were heretofore sued on in this Honorable Court by one Herman H. Heaton, a citizen of Indiana, who was himself not the owner of the bonds or coupons by him sued on. Said suit was numbered in this court number — And upon proper plea in abatement filed in said action of Herman H. Heaton against Green County, showing that he was merely a fictitious plaintiff and not the owner of said bonds, said action was dismissed; and defendant further says that thereafter each and all the bonds and coupons herein sued on were sued on in

this Honorable Court by one Samuel W. Simmons, claiming to be the owner thereof, and a citizen and resident of the State of Texas, and in said action of said Simmons against this defendant, which was numbered in this court number — upon proper plea in abatement filed in said action and upon issue joined thereon and proof taken, the said Simmons testified and swore that he was the lawful owner and holder of said bonds and coupons, part of which are herein sued on; but this Honorable Court upon full hearing, sustained the plea of this defendant and dismissed said action of said Simmons against this defendant because and for that the said Simmons had fraudulently acquired the ownership of said bonds for the purpose of bringing suit in this Honorable Court," because the same is irrelevant and immaterial.

The plaintiff further moves the court to strike from the plea in abatement herein, the following words and phrases, viz:—"and defendant further says that the suit of Heaton hereinbefore mentioned against this defendant and the suit of Simmons heretofore mentioned against this defendant and this suit, is, are and each of them were brought by the same attorney whose name is signed to the petition in this case. And defendant further says that the plaintiff in this case was induced and first applied to to bring this suit, either by said same attorney or by broker of this city, who is also interested in Green County bonds and coupons, which broker is a brother-in-law of the said plaintiff, and that said plaintiff
27 well knew when he obtained the fictitious title aforesaid, or any title he has, that said bonds were not salable upon the market, having been repudiated by said county," because the same are irrelevant and immaterial.

It is ordered that said motion be set for hearing November 25, 1899.

And on the 22nd of July, 1902, the following order was entered:

This day came the plaintiff by John Barret and W. B. Thomas, his attorneys. Came also the defendant by Ernest Macpherson its attorney.

This case coming on to be heard upon the plaintiff's motion to strike out certain parts from the defendant's plea in abatement and having been argued by counsel and the court being fully advised thereof, it is ordered that said motion be and the same is hereby sustained and the following parts are stricken from said plea, to-wit:

"And defendant Green County, further says that each and all of the bonds and coupons herein sued on as belonging to plaintiff Quinlan are parts of the bonds and coupons that were heretofore sued on in this Honorable Court by one Herman H. Heaton, a citizen of Indiana, who was himself not the owner of the bonds or coupons by him sued on. Said suit was numbered in this court number —. And upon proper plea in abatement filed in said action of Herman H. Heaton against Green County, showing that he was merely a fictitious plaintiff and not the owner of said bonds, said action was dismissed; and defendant further says that thereafter each and all the bonds and coupons herein sued on were sued on in

this Honorable Court by one Samuel W. Simmons, claiming to be the owner thereof, and a citizen and resident of the State of Texas, and in said action of said Simmons against this defendant, which was numbered in this court number — upon proper plea in abatement filed in said action and upon issue joined thereon and proof taken, the said Simmons testified and swore that he was the lawful owner and holder of said bonds and coupons, part of which are herein sued on; but this Honorable Court upon full hearing, sustained the plea of this defendant because and for that the said Simmons had fraudulently acquired the ownership of said bonds for the purpose of bringing suit in this Honorable Court."

"And defendant further says that the suit of Heaton hereinbefore mentioned against this defendant and the suit of Simmons
28 heretofore mentioned against this defendant and this suit is, are and each of them were brought by the same attorney whose name is signed to the petition in this case. And defendant further says that the plaintiff in this case was induced and first applied to to bring this suit, either by said same attorney or by a broker of this city, who is also intersted in Green County bonds and coupons, which broker is a brother-in-law, of the said plaintiff, and that said plaintiff well knew when he obtained the fictitious title aforesaid, or any title he has, that said bonds were not salable upon the market, having been repudiated by said county."

And on the 13th day of October, 1902, came the parties by their attorneys. The plaintiff by his attorneys filed a reply to the defendant's plea in abatement herein, and by consent of parties by their attorneys, it is ordered that this case be and the same is hereby continued until the next term of this court.

The reply above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

L. G. QUINLAN
vs.
GREEN COUNTY.

Reply to Plea in Abatement Oct. 31, 1899.

The plaintiff L. G. Quinlan, by way of reply to the plea in abatement filed by the defendant on the 31st day of October, 1899. And to so much thereof as he is advised that it is necessary for him to answer. He denies that he acquired the bonds or coupons or causes of action or any of them, which he seeks to enforce solely or at all for the purpose of collecting such or any of the bonds or coupons in the Federal Court or in this Honorable Court under an or any agreement to pay any portion of the net or gross proceeds of any judgment he may or might obtain herein to his assignors who are the real owners of said bonds or coupons.

He denies that his assignors of said bonds or coupons are the real

owners or have any interest of any kind whatsoever in the same or any part of them.

29 He denies that any of said bonds or coupons mentioned in the petition are owned by any one except this plaintiff. He denies that said bonds or coupons or any part of them are owned by citizens or residents of Kentucky; or that they have formed any syndicate or combination for the purpose of pooling their interest or that they have by a fictitious or pretended assignment in fraud of the act of Congress in such cases made or provided, or in fraud of the jurisdiction of this court have instituted this action in the name of the plaintiff who is not the real party in interest or that plaintiff is not the real owner of said bonds and coupons mentioned in the petition. He denies that he is a nominal plaintiff in this court or is acting as such in violation of law or the rights of the defendant. He denies that the same parties who have for a long time owned said bonds or coupons or who are residents of the State of Kentucky again seek to harass or annoy the defendant in this action through the plaintiff. He denies that he is not the owner of each and every one of said bonds as well as said coupons and plaintiff again reiterates charges and avers that he is the owner and holder for value of each and every one of said bonds and coupons and that he paid cash for them. He denies that he authorized or consented to the bringing of this suit in his name for the benefit of others. He denies that he has no interest except formal or fictitious or for the purpose of giving a color of jurisdiction to this Honorable Court in said bonds and coupons mentioned in the petition.

Having fully replied to said plea in abatement plaintiff prays that said plea be overruled, disallowed and dismissed and for all other proper relief.

JOHN BARRET,
WM. B. THOMAS,
Attorneys.

L. G. Quinlan, on oath states that each and everyone of the foregoing allegations of the reply are true.

L. G. QUINLAN.

COUNTY OF NEW YORK, *State of New York*, ss:

This day personally appeared L. G. Quinlan before me a Notary Public in and for the county of state aforesaid and after being duly sworn deposes and says that each and every one of the foregoing allegations contained in said reply are true. Witness my hand and notarial seal this the 15th day of September, 1902.

[SEAL.] HARVEY B. SEYMOUR,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

30 STATE OF NEW YORK, *County of New York, ss:*

I, Thomas L. Hamilton, Clerk of the county of New York and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify, that Harvey B. Seymour, has filed in the clerk's office of the county of New York, a certified copy of his appointment and qualification as Notary Public for the county of Kings, with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature of the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 15th day of September, 1902.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

And on the 12th day of October, 1903, came the parties by their attorneys. The defendant by its attorneys filed its answer and exhibits herein. Came again the parties by their attorneys and filed a stipulation which is as follows:

"It is stipulated by the parties to this action as follows:

1. All issues of law or fact are to be tried by the court and a jury is waived.

2. The plea to the jurisdiction heretofore filed by the defendant herein is to be taken and considered as paragraph one of defendant's answer, without prejudice to defendant in any way as to proper time of filing said plea or its form in practice.

3. Each of the paragraphs of the answer of the defendant this day filed is to be taken and considered as applying to each and every paragraph of the petition, so far as applicable, and as though separate defenses had been filed to each paragraph of the petition.

4. It is agreed that all the persons from whom plaintiff obtained his bonds or coupons were at the time plaintiff obtained them or any of them residents and citizens of Kentucky."

31 The answer and exhibits above referred to are as follows:

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLIN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Answer.

Par. 1. The defendant for answer herein, adopts and makes as the first paragraph herein, the plea in abatement heretofore by the defendant herein filed, according to the stipulation filed with this answer made by and between the parties hereto.

Par. 2. The defendant denies that the County Court of Green

County ever ordered an election to be held by the qualified voters of the county to determine the question of subscribing on behalf of the county for $250,000 of the capital stock of the said Cumberland & Ohio Railroad Company, and denies that at an election so held, that is, ordered by the Green County Court, a majority of the votes cast were in favor of said alleged subscription, and denies that at any time the county court of Green County, did make a subscription for the stock of said Cumberland & Ohio R. R. Co., or did, in payment thereof, on the 1st day of April, 1871, or ever, issue the bonds of the county to the amount in the aggregate of $250,000 or of any sum. And denies that to each of said alleged bonds, or any bonds ever issued, or pretended to have been issued, by Green County, or its officials, there were attached coupons for the payment of interest signed by the county clerk of said county, and denies that by any of the bonds or coupons in the petition mentioned, the county of Green, this defendant ever promised or agreed to pay the same, or any of them, and denies that said county did by its said officers or agents ever execute or deliver for a valuable or any consideration, any of the bonds or coupons in any of the paragraphs in the petition mentioned or set forth. And denies that any bonds or coupons issued by Green County, ever became due or payable at the Bank of America, or any place at all. And says this defendant has no knowledge or information sufficient to form a belief as to whether any of the alleged bonds or coupons in the petition mentioned, at the date of their alleged respective maturities were duly
32 or in any way presented at the Bank of America in the city of New York and state of New York for payment.

Par. 3. Defendant, Green County, denies that it, or the Green County Court, ever executed or delivered any of the bonds or coupons in the petition mentioned.

Par. 4. Defendant, Green County, says that the alleged bonds and coupons mentioned in the petition, were executed, if executed in any way, without any consideration therefor, and that the plaintiff was well aware at the time he received or purchased or became the owner of said bonds or coupons or any of them, that no consideration therefor ever went to the county of Green.

Par. 5. The defendant, Green County, says that the alleged bonds and coupons in the petition mentioned were obtained from it by the fraud and covin and misrepresentation of the plaintiff or his assigns.

Par. 6. Further answering, defendant says that the road of the said Cumberland & Ohio Railroad Company never passed through the county of Green.

Par. 7. The defendant further answering, says that plaintiff's alleged cause of action on all the coupons in the petition mentioned, prior to the coupon alleged to have fallen due on the 1st day of October, 1884, if he ever had any cause of action thereon accrued more than five years before the institution of this action, and defendant pleads and relies upon the statutes of limitation, in such cases made and provided, as a bar to any recovery on account of said coupons accruing before the date hereinbefore mentioned, and set up in the petition.

Par. 8. The defendant says that plaintiff's alleged cause of action on the coupons in the petition mentioned as falling due prior to the 1st day of October, 1884, accrued more than fifteen years before the institution of this action, and defendant pleads and relies upon the statute of limitation, in such cases made and provided, as a bar to any recovery on account of said coupons mentioned in the petition alleged to have fallen due prior to the —.

Par. 9. Defendant further says that the *character* of the Cumberland and Ohio Railroad Company mentioned in the petition contained Section 16, which among other things declared that said Cumberland and Ohio Railroad Company "shall have all the powers and privileges conferred upon said Louisville and Nashville Railroad Company by the laws of Kentucky, for constructing and operating their said proposed railroad, not herein specified and granted and not in conflict with the terms of this charter."

Defendant says that by an Act of the General Assembly
33 of the Commonwealth of Kentucky entitled "An Act to amend the charter of the Louisville and Nashville Railroad Company" approved January 17, 1858, (1 Acts 1855-56, page 181) it was declared and enacted in sub-section 6, of section 1, thereof, among other things "that said Railroad Company may receive subscriptions of stock to their company by individuals, towns, cities, counties or other corporations, whether payable in money or other things; with such terms, and time of payment, conditions annexed, and kind of payment, that may be set forth in the subscription," etc.

Defendant says that the said Cumberland & Ohio Railroad Company more than twenty-four years ago, abandoned the road contemplated by its charter, and that by an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to amend an act, entitled 'an Act to incorporate the Cumberland and Ohio Railroad Company' approved February 24, 1869" which was approved March 18, 1878, and which amended act was adopted by said Cumberland and Ohio Railroad Company, said original road contemplated by its charter was abandoned and said road was divided into two railroad corporations known and designated respectively as the Northern Division of the Cumberland and Ohio Railroad Company and the Southern Division of the Cumberland and Ohio Railroad Company.

The defendant, Green County, further answering, says that heretofore, to-wit: on the — day of —— 1868, said county by vote of its people subscribed three thousand shares, (3,000) of one hundred dollars ($100) each, to the capital stock of the Elizabethtown and Tennessee Railroad Company and that thereafter on the 20th day of May, 1868, there was, in pursuance of the vote of the people so subscribing, entered upon the records of the Green County Court, the following order and subscription in words and figures as follows: an attested copy of which is filed herewith, as part hereof marked "Exhibit K."

"Green County Court, May Called Term, 1868, 20th Day of May, 1868.

Present: T. R. Barnett, Judge.

This day T. R. Barnett, presiding Judge and D. T. Towles, clerk of the Green County Court *this day* produced their certificates in words and figures as follows, viz: We, T. R. Barnett, presiding judge and D. T. Towles clerk of the Green County Court duly au-
34 thorized to compare the poll book of Green County, certify that at an election held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county of Green *County* shall for and on behalf of said county subscribe for 3,000 shares of the capital stock of the Elizabethtown and Tennessee Railroad Company to be paid for in the bonds of said county, payable semi-annually in the city of New York, with interest coupons attached thereto, that 586 votes were cast for said subscription and 204 against said subscription. May 20th, 1868.

T. R. BARNETT.
D. T. TOWLES.

It is therefore ordered by the court that the said vote be and is now entered of record, as follows, to-wit: 586 votes were cast for said subscription and 204 votes were cast against said subscription showing that there is a majority for said subscription of three hundred and eighty-two votes.

It is now therefore ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

Further answering, herein, the defendant says that heretofore to-wit; on the 17th day of June, 1869, two persons made a request of the Green County Court, in words and figures as follows:

We, the undersigned, Commissioners of the Cumberland and Ohio Railroad Company, hereby request the County Court of Green County, to submit to a vote of the qualified voters of said county the "question" whether said court shall subscribe for and on behalf of said county and in pursuance of the provisions of the charter of said railroad company two hundred and fifty thousand dollars to the capital stock of said company payable in the bonds of said county having twenty years to run and bearing six per cent. interest from date upon the condition that said company shall locate and construct said railroad through Green County, and within one mile of the town of Greensburg, in said county and shall expend the amount so subscribed within the limits of Green County and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company."

An attested copy of said request is filed herewith as part hereof marked "Exhibit A."

35 Defendant says that on the same 17th day of June, 1869, Thomas R. Barnett alone, and not associating with him in the consideration of the request aforesaid, the justices of the peace of said county, caused to be entered in the records of the Green County Court, a pretended order of said Green County Court in words and figures as folows:

"Present: Thomas R. Barnett, Judge.

Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the County Court of Green County to order an election in the said county of Green and to submit to the qualified voters of said county the question whether said County Court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company having twenty years to run and bearing six per cent. interest from date, and payable in the bonds of said county upon condition that said company shall locate and construct said railroad through the said county, of Green and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County, and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green County at the several voting places in said county be held and conducted by the several officers as prescribed by law for holding elections on the 3rd day of July, 1869, to vote on the question as to whether or not the said County Court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland & Ohio Railroad conditioned and to be paid as above stated."

An attested copy of said pretended order is filed herewith as part hereof marked "Exhibit B."

Defendant says that the said Thomas R. Barnett had no authority by the charter of the Cumberland & Ohio Railroad Company or by the general laws of Kentucky in force on the 17th day of June, 1869, to enter the last mentioned order, nor to order the election therein called.

36 Defendant further says that thereafter and on the 3rd day of June, 1870, the said Thomas R. Barnett alone, and not associating with him the justices of the peace of said county, caused a pretended order of the Green County Court, to be entered on the records thereof, which order is in words and figures as follows:

"Present: Thomas R. Barnett, Judge.

Whereas in pursuance of an order of this court made on the 17th

day of June, 1869, an election was held in said county of Green on the 3rd day of July, 1869, at the several precincts of said county and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars, of the capital stock of the Cumberland & Ohio railroad company, now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of said company. Now therefore, I, Thomas R. Barnett the presiding judge of the Green County Court by virtue of the authority in me vested by law and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for and on behalf of said county of Green which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is to be made with the condition set out in the order of this court ordering said election and now of record in the office of this county."

An attested copy of said pretended order of the Green County Court on the 3rd day of June, 1870, is filed herewith as part hereof marked "Exhibit C."

Defendant further says that thereafter and on the 12th day of October, 1871, the said Thomas R. Barnett alone, and not associating with him the justices of the peace of said county, caused a pretended order of the Green County Court to be entered, on the records thereof which order is bonds to the amount of two hundred and fifty thousand — in the words and figures as follows:

"Present: Thomas R. Barnett, Judge.

On motion of E. H. Hobson, director of the Cumberland and Ohio Railroad it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad be and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green County to the said railroad in the following denominations to-wit: the same to be conditioned as specified in the order submitting the vote of the said county:

37

125	bonds at	$1,000	$125,000.00
200	bonds at	500	100,000.00
250	bonds at	100	25,000.00
			$250,000.00

An attested copy of said pretended order of the Green County Court of the 12th day of October, 1871, is filed herewith as part hereof marked "Exhibit D."

Defendant further answering, says that all the pretended bonds and coupons ever issued by Green County, including the bonds and coupons in the petition mentioned, were issued under the order and proceedings of the said Thomas R. Barnett, county Judge of Green County, and had no other authority or jurisdiction or consideration therefor than his proceedings in the premises. Defendant says

that the first request of the two alleged commissioners of the railroad in relation to bonds to be issued in favor of the Cumberland & Ohio Railroad was addressed to the County Court of Green County, and solicited its action in the premises, and that the County Court of Green County never in any way acted on said request, or passed or made any order in relation to bonds to be issued or that ever was issued by Green County; that each and every order or pretended order made by the said Thomas R. Barnett, as Judge of the Green County Court was made at a called term thereof, and not at any regular term of said court, thereby excluding all the magistrates or justices of the peace of said county, from participation in or concurrence or advice with reference to the issuance of said alleged bonds or said subscription or said election of any other matter pertaining thereto; and defendant says that at all the times mentioned in said orders of the county judge alone at special or called terms, all of the officers or magistrates and justices of the peace of said county as required by law were then filled and that there were persons duly and properly elected and qualified and acting as justices of the peace of said county and essential parts of the County Court in all actions in relation to the fiscal affairs of said Green County.

Defendant further says that on the 16th day of January, 1872, the said Thomas R. Barnett alone, caused to be entered an order on the records of the Green county court, an attested copy of which is filed herewith as part hereof marked "Exhibit E."

Defendant further says that on the 9th day of February, 1872, the said Thomas R. Barnett caused to be entered upon the
38 records of the Green county court a pretended order an attested copy of which is filed herewith as part thereof marked "Exhibit F."

Defendant further says that on the 15th day of April, 1872, the said Thomas R. Barnett alone, and not associating with him the justices of the peace of Green county court, caused to be entered on the records of the Green county court a pretended order in words and figures as *words, following:*

Present: Thos. R. Barnett, Judge.

Application was this day made to the Presiding Judge of the county court of Green county, by president and Board of Directors of the Cumberland and Ohio Railroad company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland and Ohio Railroad Company, and the court being sufficiently advised it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued to be signed by the Judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

An attested copy of said last mentioned order is filed herewith as part hereof marked "Exhibit G."

Defendant further answering, says all the bonds pretended to be issued by Green county or the Green county court were, except as to numbers and amount of the exact — -lowing:

No. 89. "UNITED STATES OF AMERICA, $500.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date, the county of Green, in the State of Kentucky, will pay the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum payable semi-annually upon presentation of the proper coupons hereto attached the principal and interest being payable at the bank of America, in the city of New York.

In testimony whereof, the Judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D., 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

[Green County Seal.]

T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*"

39 Defendant further states that all the coupons pretended to have been issued by Green county, or the Green county court were, except as to numbers and amounts and periods of maturity, in the words and figures as set forth in the petition; and that Thomas R. Barnett the county judge signed each of the bonds pretended to have been issued by Green county, and the name of the clerk of the county court was lithographed under each coupon.

Defendant says that no one of the bonds or coupons ever pretended to have been issued by Green county, contained any recital whatever, mention of, or reference to the character of the Cumberland and Ohio Railroad Company, or of any general law, and that no one of said alleged bonds or coupons contained the conditions affixed and made part thereof by the pretended orders of the said Thomas R. Barnett, Judge of the Green county court.

Defendant further says that upon the entry of the pretended order of the 15th day of April, 1872, hereinbefore in this paragraph fully set forth, the county judge thereupon delivered all said bonds and coupons, and that before delivering said bonds and coupon- he was warned not to deliver or issue them, but that nevertheless he did so, and in so doing he, and those acting with him, upon the part of said Cumberland & Ohio Railroad Company, thereby perpetrated a fraud upon this defendant.

Defendant further says that at the time said pretended bonds and coupons were delivered there was no railroad whatever of the Cumberland & Ohio Railroad Company in any part of Green county; that neither then nor since has the Cumberland & Ohio Railroad Company or any other railroad company, or corporation, or corporations, or individual or individuals ever erected or constructed a railroad through Green county, and within one mile of the town of Greensburg; that there is now only four and one fifths (4 1-5) miles of railroad in Green county, and these do not run through

Green county, and were constructed or made by companies or persons other than the Cumberland & Ohio Railroad company; that there is no railroad now and never was any railroad running through Green county either by itself or by connecting with any other road or railroad; that no part of the proceeds of any of said alleged bonds or coupons and particularly those mentioned in the petition, was ever spent or used in Green county in the construction of any railroad therein; that this defendant was never exon-
40 erated completely or at all from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown and Tennessee Railroad or any part of the interest therein; that all the conditions described in the orders or pretended orders under the pretended subscription to the Cumberland & Ohio railroad company is alleged to have been made, and the vote of the people prescribing the conditions were disregarded and were never fulfilled at the time of said alleged issuance and execution of said bonds or since; that Green county never received any consideration whatever for any of said alleged bonds or coupons, and particularly those mentioned in the petition herein. The defendant therefore alleges that all of said bonds and coupons were issued without authority in law and in fraud of the rights of the tax-payers of Green county, and are without consideration in whole or in part and are void in law, and that any pretended consideration for said bonds and coupons issued as aforesaid or any of them has wholly failed and the same are null and void.

Defendant further says that at the time plaintiff became, if he ever became, the owner and holder of the coupons or bonds mentioned in the petition, he knew that said Cumberland and Ohio railroad company did not run through Green county, and within one mile of the town of Greensburg, and had notice of all the other defects and irregular-ties aforementioned, in this paragraph, and was bound to know in law, the contents of the orders or pretended orders under which said alleged bonds or coupons were pretended to have been issued, and took them subject to all equities and with the infirmities hereinbefore in this paragraph mentioned.

Defendant further says that by the terms of the charter of the Cumberland & Ohio Railroad company; in section 15 thereof, it was declared, "that any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad"; meaning the Cumberland & Ohio Railroad Company; and defendant says that said road never having passed through the county of Green before, or at the time of said alleged subscription or since, there was no authority ever given by said act or charter of the Cumberland & Ohio railroad company to Green county, or the Green county court, or the Judge thereof, to subscribe for stock in said road, and the pretended subscription in the
41 petition mentioned, and also in the proceedings of the county judge, Thomas R. Barnett, and his pretended orders was, were and are without authority of law and void, and this defendant, Green County, is in no legal way bound thereby.

Wherefore, defendant prays that the coupons sued on herein be adjudged void and without consideration, and that plaintiff's action be dismissed and that the defendant recover its costs herein expended and for all proper general and special and proper relief.

ERNEST MacPHERSON,
JOHN W. LEWIS,
D. T. TOWLES,
Attorneys for Green County.

Elliott Graham, Judge of the Green county court says that he believes that the statements of this answer are true.

ELLIOTT GRAHAM,
Judge of Green County Court.

Subscribed and sworn to before me by Elliott Graham, this 9th day of Oct. 1903.

P. F. MARSHALL,
Clerk Greene County Court.

Green County Court, May Called Term, 1868, 20th Day of May, 1868.

Present: T. R. Barnett, Judge.

This day T. R. Barnett presiding judge and D. T. Towles, clerk of the Green County Court, produced their certificate in words and figures as follows, viz: We, T. R. Barnett, Presiding Judge, and D. T. Towles, clerk of the Green County Court, duly authorized to compare the poll book of Green county, certify that at an election held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county court of Green county, shall for and on behalf of said county subscribe for 3,000 shares of the capital stock of the Elizabethtown and Tennessee Railroad company to be paid for in the bonds of said county payable in 20 years and bearing six per cent. interest payable semi-annually in the city of New York with interest coupons attached thereto, that 586 votes were cast for said subscription and 204 against said subscription. May 20th, 1868.

T. R. BARNETT.
D. T. TOWLES.

42 It is therefore ordered by the court that said vote be and is now entered of record as follows, to-wit: 586 votes were cast for said subscription and 204 votes were cast against said subscription showing that there is a majority for said subscription of three hundred and eighty-two votes. It is now therefore ordered that the clerk of this court for and on behalf of the county of Green, make this subscription on the terms specified in the order so submitting the question to a vote as aforesaid.

A copy attest.

P. F. MARSHALL,
Clerk of Green County Court.

Green County Court, June Called Term, 1869, 17th Day of June 1869.

Present: Thos. R. Barnett, Judge.

The following request of the commissioners of the Cumberland and Ohio Railroad company was this day produced into court, viz:

We the undersigned Commissioners of the Cumberland and Ohio Railroad company, hereby request the county court of Green county to submit to a vote of the qualified voters of said county the "question" whether said court shall subscribe for and on behalf of said county and in pursuance to the provisions of the Charter of said Railroad Company two hundred and fifty thousand dollars to the capital stock of said company payable in the bonds of said county having twenty years to run and bearing six per cent. interest from date upon the condition that said company shall locate and construct said railroad through Green county and within one mile of the town of Greensburg in said county and shall expend the amount so subscribed within the limits of Green county and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company.

D. T. TOWLES.
B. W. PENICK.

A copy attest.

P. F. MARSHALL,
Clerk of Green County.

Exhibit A.

43 Green County Court, June Called Term, 1869, 17th Day of June, 1869.

Present: Thos. R. Barnett, Judge.

Whereas the commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the County Court of Green County, to order an election in the said county of Green, and submit to the qualified voters of said county the question whether said County Court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company having twenty years to run and bearing six per cent. interest from date, and payable in the bonds of said county upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg in the said county and shall expend the amount so subscribed with- the limits of Green County and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad until said county of

Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green County at the several voting precincts in said county be held and conducted by the several officers as prescribed by law for holding elections on the 3rd day of July, 1869 to vote on the question as to whether or not the said County Court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland & Ohio Railroad conditioned and to be paid as above stated.

A copy—attest:

P. F. MARSHALL,
Clerk, Green County Court.

Exhibit B.

Green County Court, June Called Term, 1870, 3rd day of June, 1870.

Present: Thos. R. Barnett, Judge.

Whereas in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of
44 Green, on the 3rd, day of July, 1869, at the several precincts of said county and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of said Company. Now therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland & Ohio Railroad Company for and on behalf of the said county of Green which subscription is to be paid in the bonds of said county as prescribed in said order of subscription, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this court.

A copy—attest:

P. F. WALLACE,
Clerk, Green County Court.

Exhibit C.

Green County Court, Oct. Term, 1871, 12th Day of October, 1871.

Present: Thos. R. Barnett, Judge.

On motion of E. H. Hobson, director of the Cumberland and Ohio Railroad, it is ordered that Z. T. Smith, president of the Cumberland and Ohio Railroad and he is hereby authorized to have printed for

the county of Green the bonds to the amount of two hundred and fifty thousand dollars the amount of the subscription of Green County to the said railroad in the following denominations, to-wit: the same to be conditioned as specified in the order submitting the vote of the said county,

125 bonds at	$1,000	$125,000.00
200 bonds at	500	100,000.00
250 bonds at	100	25,000.00
		$250,000.00

A copy—attest:

P. F. MARSHALL,
Clerk, Green County Court.

Exhibit D.

45 Green County Court, January Called Term, 1872, 16th Day of January, 1872.

Present: Thos. R. Barnett, Judge.

On motion, Cumberland & Ohio R. R. Company ordered that the presiding judge of Green County Court issue the bonds of said county for the sum of thirteen thousand dollars said sum being a portion of the stock subscribed for and on behalf of said county to said railroad company said sum being required to pay E. H. Hobson who advanced the money for surveying and locating the road to Greensburg, Ky.

T. R. BARNETT,
P. J. G. C.

A copy—attest:

P. F. MARSHALL,
Clerk, Green County Court.

Exhibit E.

Green County Court, April Called Term, 1872, 15th Day of April, 1872.

Present: Thos. R. Barnett, Judge.

Application was this day made to the presiding judge of the County Court of Green County by president and Board of Directors of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said County Court of Green County, and countersigned by the clerk of said court as required by the charter of said company.

A copy—attest:

P. F. MARSHALL,
Clerk, Green County Court.

Exhibit G.

Green County Court, February Called Term, 1872, 9th day of February, 1872.

Present: Thos. R. Barnett, Judge.

Application was this day made to the presiding judge of the County Court of Green County by the Cumberland & Ohio R. R. Company to issue bonds of said county to the amount of
46 $5,000 the same being a portion of the stock subscribed for and on behalf of said county by the County Court of Green County, to said Cumberland and Ohio Railroad and the court being sufficiently advised, it is ordered that the bonds of said county to the amount of $5,000 be and the same is hereby ordered to be issued and signed as required by the charter of said Cumberland & Ohio Railroad Company.

A copy—attest:

P. F. MARSHALL,
Clerk, Green County Court.

Exhibit F.

And on the 11th day of March, 1904, came the plaintiff by Pirtle, Trabue, Doolan & Cox and George Du Relle, his attorneys. Came also the defendant by Ernest Macpherson and John W. Lewis, its attorneys. The plaintiff by his attorneys, filed a demurrer to the answer of the defendant herein, and said demurrer coming on to be heard and having been argued by counsel, and the court not being advised thereof, takes time.

The demurrer above referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLIN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Demurrer to Answer.

The plaintiff, L. G. Quinlin demurs to the answer of the defendant and to each and every paragraph thereof, because neither said answer nor any one of said paragraphs states facts sufficient to constitute a defense to this action.

PIRTLE, TRABUE, DOOLAN & COX,
GEORGE DU RELLE,
Attorneys for Plaintiff.

And on the 14th day of March, 1904, came the parties by their attorneys, and the court having considered the demurrer of
47 the plaintiff to the answer and several paragraphs thereof, of the defendant Green County, sustained said demurrer to the fifth and seventh paragraphs of said answer and overruled said

demurrer of the plaintiff to the other paragraphs of the answer of the defendant Green County, herein, to which ruling of the court adverse to them, the parties respectively except.

And on the 25th day of April, 1904, came the plaintiff by George Du Relle and E. F. Trabue, his attorneys. Came also the defendant by Ernest Macpherson its attorney. On motion of the plaintiff by his attorneys, it is ordered that he do have until April 30th, 1904, within which to file a reply herein.

And on the 30th day of April, 1904, came the plaintiff by George Du Relle and E. F. Trabue, his attorneys. Came also the defendant by Ernest Macpherson its attorney. On motion of plaintiff by his attorneys, it is ordered that he do have until May 14th, 1904, within which to file a reply herein.

And on the 14th day of May, 1904, came the plaintiff by George Du Relle, Pirtle, Trabue, Doolan & Cox, his attorneys and filed his reply herein. The reply above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

L. G. QUINLIN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Reply.

Plaintiff for reply to defendant's answer herein denies that the bonds or coupons in plaintiff's petition mentioned were or that any of them was executed without consideration, or that plaintiff was aware at any time that no consideration therefor went to the county of Green; plaintiff denies that the railroad of said Cumberland & Ohio Railroad Company never passed through the county of Green; plaintiff denies that no railroad has ever been constructed through Green County and denies that the railroad in Green County was not constructed by the Cumberland & Ohio Railroad Co. Plaintiff denies that no part of the proceeds of the bonds and coupons sued on was spent or used in Green County on the construction of a railroad therein and says that all proceeds of said bonds and of all the bonds issued by said county to said Cumberland & Ohio Railroad Company and other moneys to a great amount were so spent and used in said county. Plaintiff denies that the defendant was never exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said county to the Elizabethtown & Tennessee Railroad, and plaintiff says that defendant Green County, was fully and completely exonerated from the payment of its subscription to the capital stock of the Elizabethtown & Tennessee Railroad Company, mentioned in its answer, before the issuance or delivery of the bonds herein sued on or any of them.

Plaintiff denies that all or any of the conditions prescribed in the orders under which the subscription to the Cumberland & Ohio

Railroad Company was made or any vote of the people prescribing any condition were, or was disregarded or not fulfilled, and denies that Green county did not receive full consideration for said bonds and coupons or any of them.

Plaintiff states that by an act of the General Assembly of the Commonwealth of Kentucky, approved March 18, 1878, the corporation called the Cumberland & Ohio Railroad Company, was divided into two corporations, one of which was thereby named the Southern Division of the Cumberland & Ohio Railroad Company, and was invested with all the property rights of the aforesaid Cumberland & Ohio railroad company in and to the right of way and railroad material thereon of said latter company on all the line of its projected railroad south of Washington County, Kentucky, including the aforesaid line through Green county; that on September 19, 1878, the railroad of said southern division was incomplete, but the road-way had been almost entirely graded, a large amount of masonry for bridges had been built and a large amount of cross ties and rails had been purchased and placed upon said right of way, but said southern division on account of insufficient means was unable to complete the building of its said railroad, and on said last named date said Southern Division of the Cumberland & Ohio railroad company had been authorized by vote of its stockholders including the defendant Green county, to execute and did on said date execute a lease to the Louisville & Nashville Railroad Company for a term of twenty five years of all its property by the terms of which lease said Louisville & Nashville Railroad Company agreed to take

49 the right of way, cross-ties, railroad iron and other railroad material and construct said railroad through Green county as far as and into the town of Greensburg. That by the terms of said lease it was further provided that said Southern Division Company should issue bonds to the amount of three hundred thousand dollars ($300,000.) payable twenty years after date, with interest at seven per cent. per annum, secured by mor-gage on all the property of said Southern Division Company, to be guaranteed as to payment thereof by said Louisville & Nashville Railroad Company and to be delivered to said Louisville & Nashville Railroad Company, as security for the payment of the sums expended by it in the construction of said road with the privilege to said Louisville & Nashville Railroad Company to sell said bonds at not less than ninety cents on each dollar thereof, and if any bonds should remain after reimbursing said Louisville & Nashville Railroad Company, such bonds to be returned to said Southern Division Company. That under said contract of lease with said Southern Division of the Cumberland & Ohio Railroad Company so as aforesaid authorized by the vote of the stockholders of said company, including the defendant, the said Louisville & Nashville Railroad Company completed the building of said railroad through Green county as far as and into the town of Greensburg and said railroad has ever since been operated through Green county as far as and into the town of Greensburg.

Plaintiff further states that said Southern Division of the Cum-

berland & Ohio Railroad Company expended the amount so subscribed by Green county to the capital stock of the Cumberland & Ohio Railroad Company, to-wit: two hundred and fifty thousand dollars (250,000) within the limits of Green county. Plaintiff denies that by any act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to amend an act to incorporate the Cumberland & Ohio Railroad Company," or in any other way, said original road was abandoned.

Wherefore plaintiff prays as in his petition and for all proper relief.

DU RELLE & McHENRY,
PIRTLE, TRABUE, DOOLAN & COX,
For Plaintiff.

John W. Green says he is the agent for plaintiff, L. G. Quinlan, who is now absent from Kentucky, and that he believes *that* statements of the foregoing reply are true.

JOHN W. GREEN.

50 Subscribed and sworn to before me by John W. Green this 14th day of May, 1904. My commission expires February 15, 1908.

V. C. YEAGER,
Notary Public, Jefferson County, Kentucky.

And on the 9th day of July, 1904, came the plaintiff by Pirtle, Trabue, Doolan & Cox and George Du Relle his attorneys. Came also the defendant by Ernest Macpherson its attorney. By consent of parties the defendant has leave to amend its answer on its face and the plaintiff has leave to amend his reply on its face, which is done.

Came again the defendant by its attorney and filed its demurrer to the plaintiff's reply herein and said demurrer coming on to be heard was argued by counsel and the court being fully advised thereof, it is ordered that said demurrer be and the same is hereby overruled, to which the defendant excepts.

Came again the defendant by its said attorney and filed its rejoinder herein. Came again the plaintiff by his said attorneys and moved the court to strike out from the rejoinder of the defendant, the following words appearing on page two (2) of line eight (8) to-wit:—"and denies that under said alleged contract or lease mentioned in the reply with said Southern Division of the Cumberland and Ohio railroad company and the Louisville and Nashville Railroad Company, defendant Green County authorized the Louisville and Nashville Railroad Company to complete or that under a lease authorized by Green County the said Louisville and Nashville Railroad Company completed the building of said railroad through Green county as far as and into the town of Greensburg."

And the court being fully advised of said motion it is ordered that said motion be and the same is hereby sustained upon the ground that those parts of the rejoinder are not responsive to any

statement in the plaintiff's pleadings and it is ordered that said words in said rejoinder, to-wit, "and denies that under said alleged contract or lease mentioned in the reply with said Southern Division of the Cumberland and Ohio Railroad Company and the Louisville and Nashville Railroad Company defendant, Green
51 county, authorized the Louisville and Nashville Railroad Company to complete or that under a lease authorized by Green County the said Louisville and Nashville Railroad Company completed the building of said railroad through Green county, as far as and into the town of Greensburg;" be and they are hereby stricken out of said rejoinder, to all of which the defendant excepts.

Leave is given the defendant to amend its rejoinder herein if it is so advised; thereupon said defendant by its said attorney, announced in open court that it declined to so amend.

The demurrer above referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Demurrer.

The defendant Green county, demurs to the reply of the plaintiff herein, because it does not state facts sufficient to constitute or to support a cause of action against this defendant, or to present a defense to its answer.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Att'ys for Defendant.

The rejoinder above referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Rejoinder.

The defendant Green county, rejoining herein, denies that all the proceeds of the alleged bonds issued by Green county
52 and of all the bonds issued by said county to the Cumberland and Ohio Railroad Company and other moneys to a great amount were spent or used in said county in the construction of a

railroad therein; or that other moneys to a great amount were so spent or used in said county and defendant Green county, denies that it was fully or completely, or at all, exonerated from the payment of its subscription to the capital stock of the Elizabethtown and Tennessee Railroad company before the issuance or delivery of the bonds herein sued on, or any of them.

Defendant denies that on September 19, 1878, the road of the Cumberland and Ohio Railroad Company in said county of Green had been almost entirely graded, or that the railroad of the said Southern Division of the Cumberland and Ohio Railroad Company had been almost entirely graded, and denies that a large amount of masonry for bridges had been built, and it denies knowledge or information sufficient to form a belief as to what crossties or rails had been purchased and placed upon the right-of-way of the Southern Division of the Cumberland and Ohio Railroad Company and denies that a large amount of cross ties and rails had been purchased or were placed upon the right of way of the Southern Division of the Cumberland and Ohio Railroad Company in Green County. And denies that the Cumberland and Ohio Railroad Company or the Southern division of the Cumberland and Ohio Railroad Company had been authorized by a vote of its stockholders, including this defendant, to execute or did ever execute, by a vote of this defendant, the lease mentioned in the reply to the Louisville and Nashville Railroad Company; and denies that under said alleged contract or lease mentioned in the reply with said Southern Division of the Cumberland and Ohio Railroad Company and the Louisville and Nashville Railroad Company, defendant, Green county, authorized the Louisville and Nashville Railroad Company to complete, or that under a lease authorized by Green county the said Louisville and Nashville Railroad Company completed the building of said railroad through Green county as far as and into the town of Greensburg; and denies that said railroad by authority of stockholders of the Cumberland and Ohio Railroad Company or of the southern division of the Cumberland and Ohio Railroad Company, including the county of Green, has ever since been operated through Green county as far as and into the town of Greensburg.

53 Defendant Green County, denies that the Southern Division of the Cumberland and Ohio Railroad Company expended the amount of the alleged subscription of Green county, to-wit two hundred and fifty thousand dollars ($250,000) within the limits of Green county.

ERNEST MACPHERSON &
JOHN LEWIS,
Att'ys for Green County, Ky.

Eliott Graham says he is the Judge of the Green County Court, State of Kentucky, and that he believes the averments of this rejoinder are true.

ELLIOTT GRAHAM,
Judge of Green County Court.

Subscribed and sworn to by Elliott Graham before me this 29th day of June, 1904.

[SEAL.] C. H. NOGGLE,
Notary Public for Green Co., Ky.

My commission expires February 28, 1906.

And on the 10th day of October, 1904, came the parties by their attorneys and by consent, it is ordered that this case be set for hearing October 26th, 1904.

And on the 26th day of October, 1904, came the plaintiff by Edmund F. Trabue, and George Du Relle his attorneys. Came also the defendant by John W. Lewis, and Ernest Macpherson, its attorneys.

This cause coming on to be heard and having been argued by counsel and the court not being fully advised of the judgment which it is proper to render herein, takes time.

And on the 5th day of November, 1904, the following judgment was entered:

United States Circuit Court, Western District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Judgment.

This action by a stipulation in writing, having been heretofore submitted to the judgment of the court without the intervention of a jury, and the court having heard the evidence and the arguments of counsel, and being now sufficiently advised, makes part of this judgment the following:

54

Finding of Fact.

1. The court finds that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was then the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.

2. That the Cumberland & Ohio Railroad Company was a corporation organized and existing under the laws of the state of Kentucky, with power to receive a subscription to its capital stock from the defendant, Green County, and said county was authorized comformably to law to make a subscription to said capital stock and to pay for the same in the bonds of said county.

3. That on June 17th, 1869, there was, as appears from the records thereof, presented to the Green County Court by the commissioners of said railroad company the following request:

"We, the undersigned, commissioners of the Cumberland and Ohio Railroad Company, hereby request that the County Court of Green County submit to a vote of the qualified voters of said county the question, 'Whether said court shall subscribe for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date, upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company."

4. That on the same day, namely, on June 17th, 1869, the County Judge of Green County, acting alone and as the County Court, entered an order in said Court in the following language:

55 "Present: Thos. R. Barnett, Judge.

"Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company, have requested the County Court of Green County to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company and payable in the bonds, of said county, having twenty years to run and bearing six per cent. interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore, ordered by the court that an election by the qualified voters of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the third day of July, 1869, to vote on the question as to whether or not the said county court shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the cap-

ital stock of the said Cumberland & Ohio Railroad conditioned and to be paid, as above stated."

5. That at the election held pursuant to said order there were cast in favor of said proposition and subscription a majority of the votes of the qualified voters of said county, and this fact, upon being duly ascertained, was certified by the proper officers as required by law.

6. That on the third day of June, 1870, the County Judge of said county, acting alone and as the county court of said county, entered an order in said court as follows:

56 "Present: Thomas R. Barnett, Judge.

"Whereas, in pursuance of an order of this court made on the 17 day of June, 1869, an election was held in said county of Green, on the third day of July, 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company; now it further appearing that said election was held in conformity with the law, and in accordance with the provisions of the charter of said company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company, for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court, ordering said election and now of record in the office of this county."

7. That on the 12th day of October, 1871, the said county Judge of said county, acting alone and as the county court of said county, entered an order in said court in the following language:

"Present: Thomas R. Barnett, Judge.

"On motion of E. H. Hobson, Director of the Cumberland and Ohio Railroad, it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green county to the said railroad, in the following denominations, to-wit, the same to be conditioned as specified in the order submitting the vote of the said county;

"125 bonds at	$1,000	$125,000.00
"200 bonds at	500	100,000.00
"250 bonds at	100	25,000.00
		$250,000.00

8. That pursuant to all that was done, as aforesaid, the defendant, Green County, issued and delivered to the said Cumberland & Ohio

57 Railroad Company $250,000 of its bonds of the description aforesaid except that the said conditions were not stated therein, in payment of said subscriptions to said capital stock, and thereupon there was delivered to said county in payment thereof, and said county received, and has ever since held and owned, the certificates of the said railroad company for the 2,500 shares of $100 each of its capital stock so paid for by said bonds.

9. That the $17,500 of bonds and coupons sued on in this action were part of the bonds thus issued and delivered to said railroad company in payment for said stock.

10. That while the proposed line of said railroad was located through said county from its northern line to its southern line, and within one mile of Greensburg, yet that only about five miles of said railroad has ever been constructed or attempted to be constructed in said county, the part thus constructed extending from the northernmost line of said county to the town of Greensburg, the county-seat; which town is located about fifteen miles from the souther-most line of the county and about as distant from any other line of the county except the northern line.

11. That only $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green county. No other part of said bonds was expended in said county.

12. That with said $150,000 of said bonds the grading, bridging and tunneling on the track of said railroad was done and paid for over the five miles aforesaid, but no further, and when this was done, the work on the railroad was suspended for some years. Afterwards the rails and ties and superstructure generally were put upon the track theretofore graded and the railway was completed from the northernmost line of the county to Greensburg under the terms of itlease, by the Louisville & Nashville Railroad Company at its own expense, and not with any of the bonds issued as aforesaid by the defendant.

13. That on the 15th day of August, 1872, at a called term of the Green County court, over which Thomas R. Barnett, County Judge, presided, and no justice of the peace being present, the following order was entered by said court:

"Present: Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the County Court of Green county, by the President and Board of Directors of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the
58 subscriptions of said county of Green to said Cumberland & Ohio Railroad Company, and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

14. That except as to the number of the bond and the amount agreed to be paid therein the bonds sued on were each of the following, namely:

"UNITED STATES OF AMERICA, $500.00
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semiannually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

In testimony whereof, the Judge of said county of Green has hereunto set his hands and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

[Green County Seal.]

T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*"

As appears on the face of each of said bonds there was no recital therein of any of the facts herein found to be true.

15. That the plaintiff knew when he purchased the bonds sued on that the railroad had not been constructed in Green county otherwise than as herein found to be the fact, namely, from the northern line of said county to the town of Greensburg, but no further.

16. That in the year 1868, upon a proposition therefor being submitted to the vote of the qualified voters of Green County, the majority of said qualified voters voted in favor of a proposition to subscribe for $300,000 of the capital stock of the Elizabethtown & Tennessee Railroad Company, and upon the said result of the election being properly ascertained and certified the
59 county judge of Green county, sitting alone and as the county court of said county, made and entered of record in said court the following orders:

1868. "Green County Court, May Called Term, 1868, 20th Day of May.

Present: T. R. Barnett, Judge.

"This day T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, *this day* produced their certificate in words and figures as follows, viz: We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, duly authorized to compare the Poll Book of Green county, certify that an election held in said county at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county subscribe*d* for three thousand shares in capital stock of Elizabethtown & Tennessee Railroad Co. to be paid for in the bonds of said county, payable in twenty years and bearing six per cent. interest

ayable semi-annually in the city of New York, with interest cou-ons attached thereto, and that 586 votes were cast for said sub-cription and 204 against said subscription. May 20th, 1868.

T. R. BARNETT.
D. T. TOWLES.

"It is therefore ordered by the court that the said vote be, and is ow, entered of record, as follows, to-wit: 585 votes cast for said ubscription and 204 votes were cast against said subscription, show-ng that there is a majority for said subscription of three hundred nd eighty-two votes.

"It is now, therefore, ordered that the clerk of this court, for and n behalf of the county of Green, make said subscription on the rms specified in the order submitting the question to a vote as foresaid."

17. That no formal or express exoneration of said county from the ayment of said last named subscription was ever made or attempted, ut nothing further has, up to this date, ever been done in respect o it, and neither bonds by the county nor stock by the said last amed railroad company, have ever been issued or delivered in xecution of said orders or under the terms of said subscription.

Upon consideration of the facts hereinbefore found to be true, nd of the opinion of the Court of Appeals, in the case of J. D. hortell *vs.* Green County, the court, in deference to said opinion, as reached the following

0 *Conclusions of Law.*

1. That the plaintiff is not entitled to recover because the con-itions upon which the subscription for the capital stock of the umberland & Ohio Railroad Company was made and upon which e bonds sued on were issued have not been performed or complied ith, and

2. That the failure to recite in the bonds any of the facts herein und to be true, or any of the conditions upon which the bonds were sued, is immaterial as against the defense that there was a failure perform the said conditions.

Judgment.

In consideration of the premises it is considered and adjudged by e court that the plaintiff's petition be and it is dismissed and that e defendant recover of the plaintiff its cost herein expended, and may have execution therefor. To this judgment and to each part it the plaintiff excepts.

And on the 2nd day of May, 1905, there was filed in the Clerk's fice, the following paper:

he people of the State of New York to all to whom these presents shall come, or may concern, send greeting:

Know ye, that we having inspected the Records of our Surrogates' urt in and for the county of New York, do find that on the 20th

day of April, in the year one thousand nine hundred and five by said court Letters Testamentary on the estate of Leonard G. Quinlan late of the county of New York, deceased, were granted and committed unto Mary Amis Quinlan, the executrix named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

In testimony whereof, we have caused the seal of the Surrogates' court of the county of New York, to be hereunto affixed. Witness Hon. Abner C. Thomas, a Surrogate of our said county in the City of New York, the 26th day of April, in the year of our Lord, one thousand nine hundred and five.

[SEAL.] JAMES A. DONNELLY,
Clerk of the Surrogates' Court.

61 And on the 2nd day of May, 1905, came Mary Amis Quinlan, Executrix of the last will and testament of Leonard G. Quinlan, plaintiff herein, lately deceased, by George Du Relle and Edmund F. Trabue, her attorneys, and presented to the court her petition for a writ of error and assignment of errors, and in consideration whereof, it is now ordered that said petition for writ of error and assignment of errors be and they are hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Sixth Circuit, the judgment and proceedings heretofore entered and had herein upon the plaintiff giving bond according to law in the sum of $500.00 and thereupon the plaintiff tendered said bond with Edmund F. Trabue as surety which bond is now ordered to be filed and is hereby approved.

The Petition for writ of error above referred to is as follows:

United States Circuit Court for the Western District of Kentucky.

LEONARD G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Petition for Writ of Error.

And now comes Mary Amis Quinlan, Executrix of the last will and testament of Leonard G. Quinlan, plaintiff herein, lately deceased, by George Du Relle and Edmund F. Trabue, her attorneys, and says that on the 5th day of November, A. D. 1904, this court entered judgment herein in favor of the defendant against said plaintiff in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and

that a transcript of the record, proceedings, and papers in this cause, duly authenticated may be sent to the said Court of Appeals.

EDMUND F. TRABUE,
GEORGE DU RELLE,
Atty's for Plaintiff in Error.

62 The assignment of Errors above referred to is as follows:

United States Circuit Court for the Sixth Circuit and Western District of Kentucky.

LEONARD G. QUINLAN, Plaintiff in Error,
vs.
GREEN COUNTY, Defendant in Error.

Assignment of Errors.

Afterward, to-wit, on the — day of May, A. D. 1905, comes Mary Amis Quinlan, executrix of the last will and testament of the said Leonard G. Quinlan, lately deceased, plaintiff in error, by George Du Relle and Edmund F. Trabue, her attorneys, and says that in the record of the proceedings in the above entitled cause in the Sixth Circuit Court for the Western District of Kentucky, there is manifest error in this to-wit:

I. In adjudging that plaintiff's petition be dismissed and in dismissing said petition, and in adjudging that the defendant recover of plaintiff its costs in said cause expended and have execution.

II. In finding and adjudging that plaintiff in error was not entitled to recover upon his cause of action asserted in the said cause because the conditions had not been performed or complied with upon which the subscription for the capital stock of the Cumberland and Ohio Railroad Company was made, to-wit, the conditions that said company should locate and construct its railroad through Green county and within one mile of the town of Greensburg in said county and should expend the amount so subscribed within the limits of Green county and that its said defendant's bonds for payment of its subscription to the capital stock of said company should not be issued or said county pay any part of either principal or interest of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company; and in deciding and adjudging that said plaintiff could not recover because any one of the conditions above recited had not been performed and complied with.

63 III. In finding and adjudging that plaintiff in error was not entitled to recover upon the cause of action asserted in such cause, because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been performed or complied with; that said company should locate and construct its railroad through Green county, and within one mile of the town of Greensburg, in said county.

IV. In deciding and adjudging that said plaintiff in error was not entitled to recover upon said cause of action because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been complied with, that said company should expend the amount so subscribed within the limits of Green county.

V. In finding and adjudging that plaintiff in error was not entitled to recover upon its cause of action because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been performed or complied with, that said defendant's bonds for payment of its subscription to the capital stock of said company should not be issued, or said county pay any part of either principal or interest of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company.

VI. In finding and adjudging that the county of Green had not been fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company by reason of the facts found to exist in the finding of fact.

VII. In deciding and adjudging that the failure to recite in the bonds the facts found by the Circuit Judge to be true, or any of the conditions upon which the bonds were issued was immaterial as against the defense that there was a failure to perform the said conditions.

VIII. In adjudging that the plaintiff in said cause was not entitled to recover the sums of money claimed in his petition or any part thereof.

EDMUND F. TRABUE,
GEORGE DU RELLE,
Counsel for Plaintiff in Error.

64 The Bond above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky.

LEONARD G. QUINLAN
vs.
GREEN COUNTY.

Know all men by these presents, That we, Mary Amis Quinlan, Executrix of the will of Leonard G. Quinlan, lately deceased, and Edmund F. Trabue, are held and firmly bound unto Green County, Kentucky, in the sum of five hundred dollars, to be paid to the said Green County, Kentucky, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the 1st day of May, A. D. 1905.

Whereas the above named Mary Amis Quinlan, executrix of the

will of Leonard G. Quinlan, lately deceased, hath prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit Court to reverse the judgment rendered in the above entitled suit, by the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

Now therefore, the condition of this obligation is such, that if the above named Mary Amis Quinlan, executrix of the will of L. G. Quinlan, deceased, shall prosecute her said writ of error to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MARY AMIS QUINLAN,
Executrix of the Will of Leonard G. Quinlan, Deceased,
By EDMUND F. TRABUE, *Attorney.*
EDMUND F. TRABUE.

Approved May 2nd, 1905.
WALTER EVANS, *Judge.*

65 And on the fourth day of May, 1905, the following paper was filed in the clerk's office:

The people of the state of New York, by the Grace of God free and Independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the Surrogate, of the county of New York, do find there remaining a certain record of the Letters Testamentary granted to Mary Amis Quinlin upon the estate of Leonrad G. Quinlin, deceased, in the words and figures following, to-wit:

[SEAL.]

The people of the state of New York, by the Grace of God, Free and Independent, to all to whom these presents shall come or whom they may concern, send Greeting:

Know ye, that at the county of New York, on the 19th day of April, in the year of our Lord one thousand nine hundred and five before Hon. Abner C. Thomas, a surrogate of our said county, the last will and testament of Leonard G. Quinlin, deceased, was proved, and is now approved and allowed by us and the said deceased having been at the time of his death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and creditors of the said testator and also the auditing allowing and final discharging the account thereof, doth belong unto us the administration of all and singular the goods, chattels and credits of the said deceased in any way concerning his will, is granted unto Mary Amis Quinlan, of the city of New York, executrix in the said will named, she being first duly sworn, well faithfully and honestly to discharge the duties of such executrix.

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

Witness Hon. Abner C. Thomas, a surrogate of our said county of New York at said county, the 20th day of April, in the year of our Lord one thousand nine hundred and five.

[SEAL.] JAMES A. DONNELLY,
Clerk of the Surrogate's Court.

All which we have caused by these presents to be exemplified and the seal of our surrogate's court to be hereunto affixed.

Witness, Hon. Abner C. Thomas, a surrogate of the county of New York at the city of New York, the second day of May
66 in the year of our Lord, one thousand nine hundred and five, and of our Independence the one hundred and twenty-ninth.

[SEAL.] JAMES A. DONNELLY,
Clerk of the Surrogates' Court.

I, Abner C. Thomas, a surrogate of said county and presiding magistrate of the Surrogates' court do hereby certify that James A. Donnelly whose name is subscribed to the preceding exemplification is the clerk of said surrogates' court, of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' court and that the attestation thereof is in due form, and according to the form of attestation used in this state.

Dated, New York, May 2nd, 1905.

ABNER C. THOMAS,
Surrogate.

STATE OF NEW YORK, *County of New York, ss:*

I, James A. Donnelly, clerk of the Surrogates' court of the county of New York, do hereby certify that Hon. Abner C. Harris, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogates' court of the county of New York, elected, duly sworn and qualified, and that the signature of said magistrate to said certificate is genuine. In testimony whereof, I have hereto set my hand and affixed the seal of the said court, this 2nd day of May, 1905.

[SEAL.] JAMES A. DONNELLY,
Clerk of the Surrogates' Court.

(Endorsed on back as follows:) Surrogates' Court, County of New York. In the matter of the estate of Leonard G. Quinlan, deceased. (Exemplified copy.) Filed 4 of May, 1905, A. G. Ronald, clerk.

And on the 4th day of May, 1905, came Mary Amis Quinlan, executrix of Leonard G. Quinlan, plaintiff herein lately deceased,
67 by George Du Relle and Edmund F. Trabue, her attorneys and presented to the court her petition for a writ of error and assignment of errors and in consideration whereof it is now

ordered that said petition for a writ of error and assignment of errors be and they are hereby allowed to have reviewed in the United States Circuit Court of Appeals for the 6th Circuit the judgment and proceedings heretofore entered and had herein upon the plaintiff giving bond according to law in the sum of $500.00 and thereupon the plaintiff tendered said bond with Edmund F. Trabue as surety which bond is now ordered to be filed and is hereby approved.

The petition for Writ of Error referred to is as follows:

United States Circuit Court, Western District of Kentucky.

LEONARD G. QUINLAN, Paintiff,
vs.
GREEN COUNTY, Defendant.

Petition for Writ of Error.

And now comes Mary Amis Quinlan, executrix of the last will and testament of Leonard G. Quinlan, plaintiff herein, lately deceased, by George De Relle and Edmund F. Trabue her attorneys, and says that on the 5th day of November, A. D. 1904, this court entered judgment herein in favor of the defendant against said plaintiff in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition. Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Court of Appeals.

GEO. DU RELLE,
EDMUND F. TRABUE,
Attorneys for Plaintiff in Error.

68 The Assignment of Errors above referred to is as follows:

United States Circuit Court for the Sixth Circuit and Western District of Kentucky.

LEONARD G. QUINLAN, Plaintiff in Error,
vs.
GREEN COUNTY, Defendant in Error.

Assignment of Errors.

Afterwards, to-wit, on the 4th day of May, A. D. 1905, comes Mary Amis Quinlan, executrix of the last will and testament of the said Leonard G. Quinlan lately deceased, plaintiff in error, by George Du Relle and Edmund F. Trabue, her attorneys, and says that in the record of the proceedings in the above entitled cause in the Sixth

Circuit Court, for the Western District of Kentucky, there is manifest error in this, to-wit:

I. In adjudging that plaintiff's petition be dismissed and in dismissing said petition, and in adjudging that the defendant recover of plaintiff its costs in said cause expended and have execution.

II. In finding and adjudging that plaintiff in error was not entitled to recover upon his cause of action asserted in the said cause because the conditions had not been performed or complied with upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made, to-wit, the conditions that said company should locate and construct its railroad through Green county and within one mile of the town of Greensburg in said county and should expend the amount so subscribed within the limits of Green County, and that its said defendant's bonds for payment of its subscription to the capital stock of said company should not be issued or said county pay any part either principal or interest of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company; and in deciding and adjudging that said plaintiff could not recover because any one of the conditions above recited had not been performed and complied with.

69 III. In finding and adjudging that plaintiff in error was not entitled to recover upon the cause of action asserted in said cause because the condition of said subscription for the capital stock of the Cumberland & Ohio Railway Company had not been performed or complied with; that said company should locate and construct its railroad through Green county, and within one mile of the town of Greensburg in said county.

IV. In deciding and adjudging that said plaintiff in error was not entitled to recover upon said cause of action because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been complied with, that said company should expend the amount so subscribed within the limits of Green county.

V. In finding and adjudging that plaintiff in error was not entitled to recover upon its cause of action because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been performed or complied with, that said defendant's bonds for payment of its subscription of the capital stock of said company should not be issued, or said county pay any part of either principal or interest of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company.

VI. In finding and adjudging that the county of Green had not been fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company by reason of the facts found to exist in the finding of fact.

VII. In deciding and adjudging that the failure to recite in the

bonds the facts found by the Circuit Judge to be true, or any of the conditions upon which the bonds were issued was immaterial as against the defense that there was a failure to perform the said conditions.

VIII. In adjudging that the plaintiff in said cause was not entitled to recover the sums of money claimed in his petition or any part thereof.

GEO. DU RELLE,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

70 The Bond above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky.

LEONARD G. QUINLAN
vs.
GREEN COUNTY.

Know all men by these presents, that we, Mary Amis Quinlan, Executrix of the will of Leonard G. Quinlan deceased and Edmund F. Trabue are held and firmly bound unto Green county, Kentucky, in the sum of five hundred dollars, to be paid to the said Green County, Kentucky, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents:

Sealed with our seals and dated this fourth day of May, A. D. 1905.

Whereas the above named Mary Amis Quinlan, executrix of the will of Leonard G. Quinlan, lately deceased, hath prosecuted a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment rendered in the above entitled suit, by the Circuit Court of the United States for the District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named Mary Amis Quinlan, executrix of the will of Leonard G. Quinlan, deceased, shall prosecute her said writ of error to effect, and answer all damages and costs, if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MARY AMIS QUINLAN,
Executrix of the Will of Leonard G. Quinlan, Deceased,
By EDMUND F. TRABUE, *Attorney.*
EDMUND F. TRABUE.

Sealed and delivered in the presence of
V. C. YEAGER.
HARRY LANCASTER.

Approved:

WALTER EVANS, *Judge.*

71 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 137 pages contain a true and correct copy of the record and proceedings in the case of L. G. Quinlan *v.* Green County, No. 6729, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 29th day of May, 1905.

A. G. RONALD, *Clerk,*
By HENRY F. CASSIN, *D. C.*

[SEAL.]

UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you or some of you, between Leonard G. Quinlan, plaintiff, and Green County, Kentucky, defendant, the said plaintiff having died since said judgment was rendered, and Mary Amis Quinlan having been appointed Executrix of his will and estate as appears by copy of her appointment this day filed in the office of the clerk of said Circuit Court, a manifest error hath happened, to the great damage of the said plaintiff and to his estate, and to his devisees, legatees and personal representative as by the executrix's complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 1st day of June, 1905, in the said Circuit
72 Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of May, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

[SEAL.]

A. G. RONALD,
Clerk of the Circuit Court of the United States for the Western District of Kentucky.

Allowed by
WALTER EVANS, *Judge.*

*Not exceeding 30 days from the day of signing the citation.

Filed May 31, 1905.

FRANK O. LOVELAND, *Clerk.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Green County, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the* first day of June, 1905, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Kentucky, wherein Mary Amis Quinlan, Executrix of the last will and testament of Leonard G. Quinlan lately deceased is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this fourth day of May, in the year of our
73 & 74 Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

[SEAL.] WALTER EVANS, *Judge.*

*Not exceeding 30 days from the day of signing.

Executed the within citation in Louisville, Ky., May 9, 1905, by delivering a true copy of the within to Ernest Macpherson, one of the attorneys for Green County. This May 9, 1905.

A. D. JAMES, *U. S. Marshal,*
By W. A. BLACKBURN, *D. M.*

Fee	$2.00
Exp.	.05
Total	$2.05

2292. E-232.
6729. L. G. Quinlan *vs.* Green County. Citation and Copy. Filed May 31, 1905. Frank O. Loveland, Clerk. Edmund F. Trabue, George Du Relle, Att'ys.

75 And afterwards towit on June 12, 1905, præcipe for appearance of counsel was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1440.

MARY AMIS QUINLAN, Ex'x,
vs.
GREEN COUNTY, KY.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in error.

EDMUND F. TRABUE.
GEORGE DU RELLE.
JOHN J. McHENRY.

And afterwards towit on December 11, 1905, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1440.

MARY AMIS QUINLAN
vs.
GREEN COUNTY, KY.

76 This cause is argued on behalf of plaintiff in error by Messrs. Edmund F. Trabue and George Du Relle, and for defendant in error by Mr. Ernest Macpherson and submitted to the Court.

And afterwards towit on February 17, 1906, an order was entered upon the Journal of said Court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1440.

MARY AMIS QUINLAN
vs.
GREEN COUNTY, KY.

It is ordered by the Court that the following questions be certified to the Supreme Court of the United States:

1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and

conditions imposed by the favorable vote of the county au-
77 thorizing a subscription to the stock of the Cumberland and Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question is deemd too broad, then:

2nd. Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been "fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said County for and in behalf of said County to the Elizabethtown and Tennessee Railroad Company?

And afterwards towit on March 6, 1906, a motion to modify certificate of questions certified to the Supreme Court was filed which reads and is as follows:

78 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1905.

#1440.

MARY AMIS QUINLAN, Executrix,
vs.
GREEN COUNTY, KENTUCKY.

Comes now the defendant in error, Green County, Kentucky, by its counsel appearing in that behalf, and moves the Court and judges thereof to amend or modify the second question certified or submitted by the judges of this Court to the Supreme Court of the United States in so far as said question implies or states that L. G. Quinlan, deceased, purchased or obtained the bonds or coupons herein sued on before their maturity, because the record in this Court does not show and it is not a fact that said L. G. Quinlan, deceased, purchased or obtained said bonds before their maturity, and the defendant in further support of said motion tenders and asks leave to file an attested copy of the deposition of said Quinlan given,
made and read on the trial of this cause in the Circuit Court
79 of the United States for the Western District of Kentucky, which deposition shows that said Quinlan obtained said bonds and coupons long after their maturity and for merely a nominal consideration.

ERNEST MACPHERSON,
Counsel for Green County.

And on the same day towit on March 6, 1906, notice of said motion to amend or modify, etc., was filed in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1905.

#1440.

MARY AMIS QUINLAN, Executrix,
vs.
GREEN COUNTY, KENTUCKY.

To Messrs. Ed. F. Trabue and George Du Relle, attorneys for plaintiff in error:

The plaintiff in error, Mary Amis Quinlan, Executrix of L. G. Quinlan, deceased, will please take notice that the defendant
80 in error, Green County, by counsel appearing in that behalf, will at the opening of the above styled Court, on Tuesday the 6th day of March, 1906, or as soon thereafter as counsel can be heard, move the Court to amend and modify the second question certified or submitted by the judges of said court to the Supreme Court of the United States in so far as said question states or implies that L. G. Quinlan, deceased, purchased or obtained the bonds or coupons sued on by him in this cause before their maturity, because the record in this Court does not show and it is not a fact that said L. G. Quinlan purchased or obtained before their maturity said bonds or coupons; and defendant will also tender and offer to file in further support of said motion an attested copy of the deposition of said L. G. Quinlan, made, given and read in this cause on the trial thereof in the Circuit Court of the United States for the Western District of Kentucky, which deposition shows that said Quinlan obtained said bonds and coupons long after their maturity and for a merely nominal consideration.

ERNEST MACPHERSON,
Counsel for Green County.

81 Louisville, Ky., Feb'y 24th, 1906.

Copy of notice and of proposed motion served this 24th day of February, 1906. To which we object.

EDMUND F. TRABUE,
GEORGE DU RELLE,
Counsel for Plaintiff in Error.

And on the same day, towit on March 6, 1906 certified copy of the deposition of Leonard G. Quinlan was filed which reads and is as follows:

Circuit Court of the United States for the Western District of Kentucky.

No. 6145.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Notice to Take Deposition.

Please to take notice that the defendant herein, Green County, will proceed, on Thursday, February 19, 1903, to take the deposition of the plaintiff, L. G. Quinlan, for use on the hearing of the
82 plea in the above styled cause, by the Honorable, the Judge of the Circuit Court, aforesaid, on the part of the defendant, *de bene esse* in pursuance of the Acts of Congress in such cases made and provided and of Section 8 of the Act of the General Assembly of the Commonwealth of Kentucky, approved February 23, 1898, before John A. Shields, Esq., United States Commissioner, or other competent officers at his office in the Borough of Manhattan in the City of New York, in the State of New York, beginning at 3.15 P. M., of said February 19, 1903. The said plaintiff, L. G. Quinlan, whom it is intended to examine is a material and necessary witness on the part of the defendant, and resides in the Borough of Manhattan, and City and State aforesaid and more than one hundred miles from the City of Louisville, in the State of Kentucky, where the Court at which the above entitled cause will be tried is to be held.

The examination of said witness will be adjourned from day to day (Sundays excepted) until finished, and to such time and place as may be required without further notice.

83 ERNEST MACPHERSON,
JOHN W. LEWIS,
D. T. FOWLES,
Attorneys for Defendant,
Louisville Trust Building, Louisville, Ky.

Dated Louisville, Ky., February 12, 1903.

To L. G. Quinlan, Esq.
To Messrs. Pirtle & Trabue, Attorneys for L. G. Quinlan.

We accept and acknowledge service of the above notice this the 14th day of February, 1903.

PIRTLE & TRABUE,
Attorneys for L. G. Quinlan.

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

Testimony taken on behalf of the defendant, pursuant to notice hereto attached, before John A. Shields, Esq., United States Commissioner, at his office, in the Post Office Building, Borough of Manhattan, in the City of New York, at 3.15 P. M., on February 19th, 1903.

84 Appearances.

Ernest Macpherson, Esq., Attorney for Defendant.
Charles W. Zaring, Esq., Attorney for Plaintiff.

LEONARD G. QUINLAN, called as a witness on behalf of the defendant, being duly sworn testified as follows:

Direct examination by Mr. MACPHERSON:

Q. 1. Mr. Quinlan, where do you reside?
A. In New York City, sir.
Q. 2. What is your occupation?
A. A broker.
Q. 3. How long have you resided in New York?
A. Over twenty years.
Q. 4. You are the plaintiff, of course in this case?
A. I am the plaintiff, sir.
Q. 5. You understand the nature of the suit?
A. Yes, sir.
Q. 6. Do you know what bonds or coupons are involved in this action?
A. Yes, sir. To the best of my recollection and from what I have before me, there is $27700. I think that is correct, but I may have some other papers. I have had so many papers since then that I have got them all mixed up. I had a lot of bonds and one thing and another.

85 By Mr. ZARING:

Q. 7. What class?
A. Green County bonds.

By Mr. MACPHERSON:

Q. 8. Do you know the denomination of the different bonds and coupons?
A. Well, only from the purchases of them. I don't know how many different kinds of bonds I have bought; that is, the different denominations. I suppose they were all $100 or $1000 bonds, I do not know. They must have been regular $1000 bonds and $500

bonds. I just said bonds, you know; I don't know whether they are $100 or $1000 bonds.

Q. 9. When were these bonds obtained by you, that are sued upon in this case?

A. Well, the first purchase made on my account here is about October 7th, 1898.

Q. 10. Do you know exactly what was purchased at that time?

A. Yes sir; I have it here from my brokers.

Q. 11. Will you file that paper from your brokers as a part of your deposition?

A. This is my own memorandum (Referring to paper in his hand).

Q. 12. Your own memorandum?

A. Yes; but I have got drafts and everything to substantiate what I say.

Q. 13. From whom were the bonds herein sued upon by you obtained?

A. Various parties.

86 Q. 14. Do you know the names of your vendors of these bonds?

A. Yes, sir, I have them here.

Q. 15. Please to give those names?

A. Well, the first purchase was October 7th, 1898, $7000. bonds and coupons, bought from J. Ross Todd,—bonds and coupons.

Q. 16. Yes, sir?

A. On the same date I bought from Louise Todd Joy $7000 bonds and coupons; on November 9th, 1898, I bought $1500 bonds from John McAteer; December 1st, S. P. Meyer, $5100; same date I bought from G. W. Simmons $990 coupons; December 7th, I bought from Mr. Hardin $1000. coupons; December 23rd, 1898, from John W. & D. S. Green $5100 coupons; December 24th, 1898, Mrs. C. H. Ryan $1000 bonds and $135 in coupons; March 25th, 1899, from G. W. Norton $150 coupons; March 22nd, 1899, H. M. Burford, $234 coupons; April 5th, 1899, Dr. Smith $360 coupons.

Q. 17. Is there any given name for that Dr. Smith?

A. No, sir.

Q. 18. Did you obtain any of these bonds herein sued on from any person other than those you named in that list?

A. Well, I am not positive as to that; because I have gone over this thing hurriedly, but I believe that this is all.

Q. 19. Now, did these persons whom you have named personally apply to you to purchase their bonds?

A. No, sir.

Q. 20. Who first called your attention to these bonds?

87 A. Well, I can't say that. It is a question—in talking over with several Kentuckians at Fisher's Island I think it was—I don't know who they were—but we were talking about these bonds and other bonds,—I have been interested in other bonds, and my attention was called to the price I could buy these bonds at, and I thought that I would buy some of them, as they were issued for railroad bonds.

Q. 21. Did you purchase these bonds through any broker?
A. I did, sir.
Q. 22. Who was the broker?
A. John W. & D. S. Green, they were my financial brokers from Louisville.
Q. 23. Are you related to either of them in any way?
A. Am I?
Q. 24. Yes, sir?
A. My wife—I am not personally, no; I am not related to them.
Q. 25. By blood or affinity?
A. No. Well, there is no relation except that one of the Greens and my wife—married sisters, that's all.
Q. 26. What did you pay for these bonds to each of the purchasers whom you have named in your paper?

Mr. ZARING: Objected to, on the ground it is immateral, irrelevant and incompetent, it being irrelevant the amount which he paid for the bonds.

88 A. Well, as far as I can put my hands on—I paid J. R. Todd, Green County bonds value received—for $14,000 Green County bonds bought from J. R. Todd and L. J. Todd, that would be $14,000.,—well, I paid for bonds bought of J. R. Todd and L. T. Joy amounting to $420.
Q. 27. For how much worth of bonds?
A. $14000 worth of bonds and coupons. December 5th I paid $14.85 for $495 of Green County bonds from G. W. Simmons; December 5th I paid $162. in payment for $5100. Green County bonds, and $600 coupons, of S. P. Meyer on December 7th, I paid $30. in payment for $1000 Green County bonds of Virgil Hardin Estate; on December 5th, I paid $45 in payment for $1500 Green County bonds of John McAteer; on December 23rd, I paid by John W. & D. S. Green $153 for $5100 Green County bonds; December 31st, 1898——
Mr. ZARING: These are all 1898?
The WITNESS: Yes, sir.
A. (continued). December 31st, 1898, $52.70 for $1000 bonds and coupons; March 31st, 1899, I paid $61.16 for Green County bonds.
Q. 28. All of these payments which you have mentioned were drafts made upon you by John W. & D. S. Green?
A. Yes, sir.
Q. 29. Have you ever seen any of the bonds and *and* coupons herein sued on?
A. Yes, sir; I think I did; I think I had them; to the best of my impression I had them, and sent them to Kentucky to be turned over to Mr. Barrett; my impression is—I am not positive whether Mr. Green had them, or whether I left them at Kentucky—held then, there or here.
89 Q. 30. Had you at the time you say you purchased these bonds known of any of the sales of these bonds in years?
A. Only by hearsay, sir.

Q. 31. Did you know at the time you obtained possession of these bonds, that the county had for over 25 years disclaimed any liability on the bonds?

A. I knew that the bonds—had stopped payment on them and forfeited their payment. I don't know the date,—the exact number. I know they were in default when I bought them.

Q. 32. Did you know at the time you obtained possession of the bonds from your brokers, Messrs. John W. & D. S. Green, that the Circuit Court of Kentucky had at that time rendered a decision declaring the bonds invalid?

A. No, I do not know that I did.

Q. 33. Was that fact brought to your attention by your brokers?

A. I cannot say now, I don't remember.

Q. 34. Did you know at the time you obtained possession of these bonds that the same bonds and coupons had been heretofore sued upon in the United States Circuit Court by the non-residents of Kentucky and the petition dismissed by the Court, on the ground that those parties were not owners of the bonds.

A. No, sir.

Q. 35. That fact was not called to your attention?

A. I do not think it was, sir.

90 Q. 36. Was there, at the time of the institution of this suit, or before it, any agreement between you and your brokers, or between these parties in any way whatever, that your name was to be used merely as a plaintiff in this suit?

A. Not at all. I bought them in my own money and in my own judgment, as I would buy any property.

Q. 37. Should you recover upon these bonds, would you give any part of the proceeds to any other person?

A. That would be a matter of consideration. I have got no right to give anything. I say no.

Q. 38. Would you feel that you are under any obligation, moral or legal, if you recovered on these bonds, in full, to give any part of the proceeds to any of those vendors from whom you obtained them?

Mr. ZARING: I object to so much of that question as refers to any moral obligation, on the ground that it is incompetent and irrelevant, the question being here solely one of legal obligation.

A. No.

Q. 39. Was there, prior to the institution of this action any agreement or understanding of any kind between you and the vendors of those bonds, them or either of them, by which in the event of a successful issue of the suit upon your part they were to receive any benefit?

A. None.

Q. 40. In making your tax return since March, 1899 have you including these bonds as part of your taxable estate?

91 Mr. ZARING: Objected to, and the witness is instructed not to answer—on the ground that it is wholly immaterial, incompetent and irrelevant.

Q. 41. Do you know, or did you ever inquire, for what purpose the bonds and coupons herein sued upon were ever executed or issued by any of the officers of Green County?

A. Not by Green County. But I inquired of others what they were issued for.

Q. 42. Then do you know for what purpose they were issued?

A. I understood—issued for railroad purposes, building railroads and opening up railroad traffic. I bought so many bonds for building railroads,—and franchise, whatever it may be.

Q. 43. Did you ever take the trouble to inquire whether there was a railroad in that County?

A. No; nor any other county, as far as I know.

Q. 44. Do you know what road these bonds were supposed to be issued for?

A. No, sir.

Q. 45. You really are under the impression, Mr. Quinlan, that there is a railroad through Green County, are you not?

A. No, sir. I do not know whether there is or not. There are so many counties in Kentucky,—and the fact of their defaulting on this, I do not know whether the road was built or not, or they paid them before this. I understood they were issued for the purpose of building a railroad.

Q. 46. And that was all your information on that particular subject?

92 A. I guess so, yes. That covers it—I think so.

Q. 47. Now, Mr. Quinlan, you had previously brought a suit in this same Court upon the bonds of Lyon County, had you not?

A. I think I did.

Q. 48. Was there ever a recovery on these bonds?

A. Yes, sir; it is my impression there was.

Q. 49. Well, do you know, you being the plaintiff in the case?

A. Well, sir, I think there was.

Q. 50. What became of the proceeds of that litigation on which you recovered?

Mr. ZARING: Objected to as entirely irrelevant, immaterial and incompetent.

A. I cannot go back twenty-five years and say what I done with the money.

Q. 51. You think that was twenty-five years ago?

A. Well, it was twelve or fifteen years ago, or more. I do not know—I should think.

Q. 52. And you do not know what became of the proceeds of that suit?

A. Not directly, no. I may have put it in the bank or spent it.

Q. 53. You yourself retained the entire proceeds of that litigation?

Mr. ZARING: Objected to on the same ground—incompetent, irrelevant and immaterial.

A. I decline to answer that question.

93 Q. 54. Well, I will ask you from whom you obtained those Lyon County bonds—what brokers?

Mr. ZARING: Objected to as incompetent, irrelevant and immaterial, being unconnected with these bonds, and having nothing to do with the issues in this case.

A. I decline to answer.

Q. 55. I will ask you if you obtained those bonds from Messrs. John W. & D. S. Green?

A. I decline to answer anything in connection with that suit, as it does not pertain to this in any shape.

Q. 56. In purchasing those Green County bonds and coupons, was anything said to you at the time about the necessity of a suit upon them in the Federal Court?

A. Well, I don't know that there was.

Q. 57. Did you ever before, in any other transaction of this character,—I mean in the relation to the purchase of county bonds—purchase bonds upon which there had been no payment made for over 21 years,—at the price anything like the figures which you have shown to have been paid for the bonds herein in litigation?

Mr. ZARING: Objected to, on the ground that it is immaterial, irrelevant and incompetent, what he might obtain on any other occasion, and having nothing to do with the bonds in question or the issues involved herein.

A. Well, I said I bought divers and hundreds of bonds, you know. I have got bonds now, $100,000 or more of them—I held them like I held these,—thought something would turn up—at all sorts of prices. I have got thousands of just such bonds.

94 Q. 58. You have no agreement whatever with Messrs. John W. & D. S. Green, in relation to the use of your name as plaintiff in this suit?

A. None whatever.

Q. 59. You have no agreement with those brokers in any way, that under any circumstances they are to receive any benefit should this suit terminate favorably for you?

A. No; I have no understanding, no promises.

Q. 60. Did you receive a broker's bill of sale when you purchased these bonds?

A. Well, I could not say.

Q. 61. You received no written bill of sale of these bonds?

A. Nothing further than the drafts, you know—Oh, yes, I have certainly received statements of purchases.

Q. 62. Have you any of those statements with you?

A. Yes, I have others similar to the three which I annex to make a part of my deposition, as follows:

LOUISVILLE, KY., *March 22nd*, 1899.

I have this day sold to Mr. L. G. Quinlan, of New York City through his agents, John W. & D. S. Green, coupons from Green County Bonds as follows: Coupons Nos. 26, 27, 28, 29, 30 and 31 from Bonds Nos. 114, 115 and 143, being 18 coupons for $15 each,

$270. Coupons Nos. 26, 27, 28, 29, 30 and 31 from Bonds Nos. 78, 98, 117, 122 and 148, being 30 coupons for $3 each,—$90, amounting to $360, for which I have received payment at 1½c on the dollar amounting to $5.40. D. T. Smith.

95 LOUISVILLE, KY., *March 25th*, 1899.

I have this day sold to Mr. L. G. Quinlan, New York City, 10 coupons from Green County, Nos. 23 to 30 incl., at $15 each, and have received payment for same at 1½¢ on the dollar amounting to $2.25. G. W. Norton.

LOUISVILLE, KY., *March 11th*, 1899.

I have this day sold to Mr. L. G. Quinlan, of New York City through his agents John W. & D. S. Green coupons from Green County Bonds, as follows: Coupons Nos. 26, 27, 28, 29, 30 and 31 from Bond No. 79, for $30 each; Coupons Nos. 26, 27, 28, 29, 30 and 31 from Bonds Nos. 68 for $3 each; Coupons Nos. 26, 27, 28, 29, 30 and 31 from bond No. 59 for $3 each; Coupons Nos. 26, 27, 28, 29, 30 and 31 from bond No. 146 for $3 each,—amounting to $234, for which I have received payment at 1½ cents—$3.51. Hy. W. Burford.

LEONARD G. QUINLAN.

Subscribed and sworn to before me this 20th day of Feb., 1903.
JOHN A. SHIELDS,
U. S. Commissioner for the District of New York.

Circuit Court of the United States for the Western District of Kentucky.

L. G. QUINLAN, Plaintiff,
vs.
GREEN COUNTY, Defendant.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

96 I, John A. Shields, a commissioner duly appointed by the District Court of the United States for the Southern District of New York, in the Second Circuit, do hereby certify, that on the 19th day of February, 1903, at my office in the Post Office Building in the City of New York, at 3:15 o'clock P. M. of said day I was attended by Ernest Macpherson, Esq., attorney for defendant and Charles W. Zaring, Esq., attorney for the plaintiff, and by the witness Leonard G. Quinlan, and the said witness, who is of sound mind and lawful age was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the above entitled cause, and his deposition was by consent of counsel for the respective parties taken down by a stenographer appointed by me for that purpose in the presence of the witness and from his statement and stenographic

notes being afterward reduced to writing by a typewriter and the deposition was read over by the witness and he subscribed and swore to the same in my presence.

I further certify that the reason for taking the foregoing deposition is that the witness is material and necessary in the cause
97 in the caption of the said deposition named and that he lives at a greater distance than one hundred miles from the place of trial of the within entitled cause.

I further certify that a notification of the time and place of taking the said deposition signed by Ernest Macpherson, John W. Lewis and D. T. Towles, attorneys for the defendant was made out and served on Pirtle & Trabue, attorneys for plaintiff as appears from said notice which is hereunto annexed. I retained the said deposition in my possession for the purpose of mailing the same to the Court for which the same was taken.

And I further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal, this 21st day of February, 1903, and of the Independence of the United States the one hundred and twenty-seventh.

JOHN A. SHIELDS,
United States Commissioner, Duly Appointed by the District Court of the United States for the Southern District of New York, in the Second Circuit.

98 UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, A. G. Ronald, Clerk of the Circuit Court of the United States, for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the Deposition of L. G. Quinlan, received and filed in said Court on the 23rd day of February, A. D. 1903, in the cause wherein L. G. Quinlan is the Plaintiff and Green County the Defendant, as the same appears from the original Deposition now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court this 2nd day of March, A. D. 1903.

A. G. RONALD, *Clerk.*

And on the same day towit on March 6th, 1903, an entry was made upon the Journal of said Court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY AMIS QUINLAN, Adm'x, etc.,
vs.
GREEN COUNTY, KENTUCKY.

99 The motion filed by defendant in error's counsel to amend or modify the certificate of this Court certifying questions to the Supreme Court is submitted.

And on the same day, towit on March 6th, 1906, an order denying said motion to amend was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1440.

MARY AMIS QUINLAN
vs.
GREEN COUNTY.

The motion in this cause to modify or amend certificate of questions certified to the Supreme Court is denied.

And afterwards towit on August 12th, 1907, a mandate from the Supreme Court of the United States was filed in said cause in the words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

100 The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Whereas, lately in the said Circuit Court of Appeals before you or some of you, in a cause between Mary Amis Quinlan, Executrix, plaintiff in error, and Green County, Kentucky, defendant in error, No. 1440, wherein certain questions arose which were certified under the seal of the said Circuit Court of Appeals to the Supreme Court of the United States for its opinion as by the inspection of the certificate of the Judges of said Circuit Court of Appeals which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said Supreme Court, on the said certificate and was argued by counsel.

101 On consideration whereof, It is the opinion of this Court that the second question certified must be answered in the affirmative.

Whereupon, It is now here ordered by this Court that it be so certified to said United States Circuit Court of Appeals.

APRIL 8, 1907.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said Certificate notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

United States, the ninth day of August in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

And afterwards towit on October 8th, 1907, an entry was made upon the Journal of said cause which reads and is as follows:

102 United States Circuit Court of Appeals for the Sixth Circuit.

1440.

MARY AMIS QUINLAN, Executrix of Leonard G. Quinlan, Deceased,
vs.
GREEN COUNTY, KENTUCKY.

This cause is argued by Mr. Alex. P. Humphrey and Mr. Edmund F. Trabue for the plaintiff in error and by Mr. Ernest Macpherson for the defendant in error and is submitted to the Court.

And afterwards to wit on December 3rd, 1907, judgment was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY AMIS QUINLAN, Executrix of Leonard G. Quinlan, Deceased,
vs.
GREEN COUNTY, KENTUCKY.

Before Lurton, Severens, and Richards, C. JJ.

Error to the Circuit Court of the United States for the Western District of Kentucky.

103 This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs and the case is remanded to the said Circuit Court with directions to enter a judgment for the plaintiff for the sum due on the bonds and coupons in suit.

And afterwards towit on December 19th, 1907, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

104 Filed Dec. 19, 1907. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1440.

MARY AMIS QUINLAN, Executrix of the Last Will and Testament of Leonard G. Quinlan, Deceased,

v.

GREEN COUNTY, KENTUCKY.

Error to the Circuit Court of the United States for the Western District of Kentucky.

Submitted December 11, 1905; Decided December 3, 1907.

Before Lurton, Severens and Richards, Circuit Judges.

This is an action brought by the plaintiff in error to recover the contents of certain bonds and coupons alleged to have been issued by the defendant in error in 1872, in payment, with other like bonds, for shares of stock of the Cumberland and Ohio Railroad Company. The plaintiff claims to be the holder for value and owner of the bonds and coupons which are the subject of the controversy.

By stipulation the case was tried by the court without a jury. The court made a finding of facts and declared its conclusion of law thereon. The result of its conclusion was that the plaintiff was not entitled to recover, and judgment was entered accordingly. The plaintiff thereupon sued out this writ of error.

By an act of the Legislature of Kentucky passed February 14, 1869, the above named railroad company was incorporated and authorized to construct a railroad from a point on the Ohio river to a point on the boundary line between Kentucky and Tennessee. Acts of Kentucky 1869, Part 1, p. 463. In the course of its authorized route was Green County, the defendant in this suit. With a view, apparently, to enable the counties along its route to aid the

105 railroad company in the construction of its road, authority for that purpose was conferred by the Act as follows: "Sec. 15. That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and that the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest

not exceeding six per cent. per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of the city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed."

And it was further provided that the application for such proceedings might be made to the judge of the county court instead of the court; whereupon he was vested with the same power. And the railroad company was authorized to "receive subscriptions of
105 stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and times of payment, conditions annexed, and kind of payment that may be set forth in the subscription."

On June 17, 1869, upon the request of the commissioners of the Railroad Company, above named, the judge of the county court entered the order following:

"Present: Thos. R. Barnett, Judge.

"Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green County to order an election in the said county of Green and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company and payable in the bonds, of said county, having twenty years to run and bearing six per cent. interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further conditions that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Eliza-

bethtown & Tennessee Railroad or any part of the interest thereon. It is therefore, ordered by the court that an election by the qualified voters of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections on the third day of July, 1869, to vote on the question as to whether or not the said county court shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland and Ohio Railroad conditioned and to be paid, as above stated."

The election was held. The vote was in favor of the proposition and was so properly certified. Thereafterwards, and on June
107 3, 1870, the county judge made an order wherein after reciting the proceedings above recited, he says: "I —— —— do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of the said Cumberland and Ohio Railroad Company for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this county." On October 12, 1871, the county judge ordered the bonds to be printed. The bonds, of which these in suit were a part, were issued and delivered to the railroad company during the succeeding year, 1872, the bulk of them on or about August 15th, on which day the county judge made the following order:

"Present: Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the county court of Green county, by the president and board of directors of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland and Ohio Railroad Company, and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

Thereupon the $250,000.00 of the capital stock of the railroad company was delivered to the county which has since been retained and owned by it. For a time the county raised by tax and paid the interest accruing on the bonds, but thereafter it refused to recognize their validity and refused to make further payment. The plaintiff is the *bona fide* holder for value of the bonds and coupons in suit, but had notice that the railroad had not been built further than from the north line of said county to Greensburg, which is about one-quarter of the way through the county. As to this latter fact it may be noted in this connection that only $150,000.00 of the proceeds of the bonds had been expended by the Cumberland
108 and Ohio Railroad Company in the construction of the road and this was on that part of the road north of Greensburg. This expenditure did not complete that portion of the road, but it

was completed by the Louisville and Nashville Railroad Company under the stipulation in a lease to it of its road by the Cumberland and Ohio Railroad Company, but at what cost does not appear. In respect to the conditions of the subscription for stock to pay which these bonds were voted, the facts were these. In 1868 at an election in Green county it had been voted to subscribe for $300,000.00 of the stock of the Elizabethtown & Tennessee Railroad Company to be paid for in the bonds of the county. Upon making a record of this election the county court made the following order: "It is now therefore ordered that the clerk of this court for and on behalf of the county of Green make said subscription on the terms specified in the order submitting the question to a vote as aforesaid." But nothing further was ever done in regard to such a subscription either by the county or the Elizabethtown & Tennessee Railroad Company. No stock was issued to the county or bonds issued to the railroad company. Some further incidental facts will be hereafter mentioned in the opinion in the discussion of the questions involved in the controversy. The bonds in suit, except the numbers given to each bond and the amount therein specified, were in the form following:

"UNITED STATES OF AMERICA. $500.00.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

"Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, for the principal and interest being payable at the Bank of America, in the city of New York.

"In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on
109 the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

(Green County Seal.)

T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*"

The conclusion of law by the court below was "that the plaintiff is not entitled to recover because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made and upon which the bonds sued on were issued, have not been performed or complied with."

SEVERENS, Circuit Judge, having made the foregoing statement of the case delivered the opinion of the court:

The questions to be decided upon the facts found, the substance of which has been stated, and the proper inferences to be drawn

therefrom, are these, first, whether it should be held that the county of Green had been exonerated from the payment of the subscription for the capital stock of the Elizabethtown & Tennessee Railroad Company; and second, whether these bonds are invalid in the hands of the plaintiff by reason of the fact that only $150,000.00 of the proceeds of the bonds have been expended in the construction of the road in Green County, or by reason of the fact that the same has not been built through the county. These questions turn largely upon the proper interpretation of the so-called conditions upon which the county authorized these bonds to be issued.

Upon our conference after the original argument in this court we were in doubt upon some of the questions presented for decision and certified them to the Supreme Court for its opinion. One, the first of the questions, as that court thought, involved too many points. But we requested that if that question should be deemed too broad, then that the court should advise us whether, "Assuming the facts to be as found, was a *bona fide* purchaser, before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Com-
110 pany?" The Supreme Court answered this question as follows: "Construing the second question to inquire not whether there is conclusive presumption, but whether on the facts found there is any presumption at all that the county had been exonerated from its former subscription to another railroad, we answer, Yes." *Quinlan v. Green County*, 205 U. S. 410. On receiving this answer we heard further argument upon the consequences of the opinion given by the Supreme Court as well as upon the question of the character of the other so-called conditions, about which the Supreme Court expressed no opinion.

We agree that the exoneration of Green county from any liability on account of its former subscription to another railroad, was a condition precedent to the issuance of the bonds and that without the accomplishment of this condition the plaintiff can not recover. We concede this although we can not help thinking that there is room for the belief that the Legislature of Kentucky intended that the county judge should determine when and whether the condition had been accomplished, and that to hold otherwise is to suppose that these bonds, although they were by the terms of the statute, to be negotiable coupon bonds, would, although issued and put upon the market, yet be clogged with doubt of their validity, a doubt which even now might be and still is urged against them. Such bonds would not be marketable, and their purpose would be utterly defeated. For this reason it has sometimes been held that, although the statute does not expressly nominate any officer who is to pass upon the execution of the condition precedent to the issue of such bonds, yet that in view of the consequences, an implication might arise that the Legislature intended that the officer of the municipality in whose behalf he was acting and who was charged with the custody

and the issuance of the bonds, should, before delivering them, ascertain and determine whether the condition had been complied with. Especially would this be so when the question whether there had been a compliance is one which calls for the exercise of judgment upon facts with which he would be most conversant. It is true that in most of these cases, perhaps in all, there were recitals in the bonds of the regularity of the anterior proceeding or the fulfillment of
111 conditions precedent; but it would seem that for other reasons if it is intended by the statute that the determination of the fact is committed to the official who issues the bonds, such determination ought to settle the fact. If in such conditions the bonds should be issued without such determination,—the question would be open. But here the county judge acted advisedly. In the order that the bonds be issued he recites that he was sufficiently advised, borrowing an expression from legal procedure, to denote that he had taken notice and considered the question whether the conditions existed which authorized the issuance of the bonds; in other words that he had exercised the function devolved upon him. Granting, what must be regarded as settled by authority, that when the condition consists of a distinct and indubitable fact, and nothing is left to the judgment of the official charged with the delivery of the bonds, his delivery of them without the occurrence of the condition would be unauthorized and the bonds be void, yet it would seem upon principle, that if the question whether the condition has been accomplished is one of doubt and uncertainty and it is apparent that the officer who has charge of the issuance of the bonds is to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county. This is, as we understand, the doctrine on which the judgment of the Supreme Court in *Provident Trust Co. v. Mercer County*, 170 U. S. 593, 604 was finally rested. But without pursuing that subject further, we are of opinion that upon other grounds the question whether Green county, was exonerated from the obligations of the former vote should be determined in the affirmative. We may say in passing that there seemed to be grave reasons for doubting whether Green county ever came under an obligation to the Elizabethtown & Tennessee Railroad Company. The subscription was voted and the county court ordered its clerk to subscribe for the stock. But that was all. The clerk did not subscribe. No bonds were ever issued and no stock was ever delivered or tendered to the county. In *Bates county v. Winters*, 112 U. S. 325, Ch. Justice Waite, after referring to previous cases, summed up the rule as follows: "The rule
112 may be stated thus: An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that resolution to the company for acceptance as a subscription, and the company does, in fact, accept, and notifies the municipality, or its proper agent, to that effect, the

contract of subscription is complete, and binds the parties according to its terms." This is a careful and undoubtedly correct statement of the law upon the subject. See also Morawetz on Corp. Secs. 61, 134. *Green v. Sigua Iron Co.*, 88 Fed., 203, 31 C. C. A. 488. The county judge might well have thought that as there had been no complete subscription by an actual subscription, and by the acceptance and notification of the railroad company, the county was exonerated from its vote to authorize the proposed subscription. The language of the condition is that the county shall be "exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad."

This does not import that, completed subscription had been made, but only that a subscription had been authorized by the former vote, and the county would be exonerated if the subscription which it had authorized was not completed so as to bind the county. These bonds were not issued until four years after the vote of the county authorizing the subscription for stock of the Elizabethtown & Tennessee Railroad Company had been taken and recorded. Meantime, this latter company had given no token of its acceptance, and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified in the order submitting the question to a vote. And the subscription was never completed. What more complete exoneration from its former vote could the county of Green have? But, to return to the line of reasoning which we were intending to pursue; we are advised
113 by the answer of the Supreme Court that there was, upon the facts found a presumption in favor of the bonds that the county had been exonerated from the vote to subscribe to the other railroad stock; not a conclusive presumption, but one that might be controverted. But there is nothing in the facts found which controvert it. On the contrary the facts confirm the presumption. A long time has elapsed since the vote of the county authorized a subscription to the Elizabethtown & Tennessee Railroad Company's stock, several times the length of time required by any statute of limitations even supposing there had been a complete agreement for the subscription—and no step had been taken—if it be said that the condition must have existed when the bonds were issued in order to make them valid and that the lapse of time since is immaterial, the answer is that though in one sense this is true, yet in another sense it is important, for the fact that nothing had since been done by either party upon the footing of the vote is pregnant evidence to show that when these bonds were issued neither the county nor the Elizabethtown & Tennessee Railroad Company regarded itself as under any contract relations with the other. It may be that if a formal release was necessary there might be some weight in the suggestion that the trial court has found that no such release was ever given and that this would controvert the presumption that the county had been exonerated. But, as the Supreme Court said in its opinion, no formal release was necessary. "It (the condition) was completely fulfilled, if from any circumstance it should appear that

the county had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown Railroad."

We come then to the question whether the other provisions of the vote on which the bonds in suit were issued, namely; "that said company shall locate and construct said railroad through said county of Green * * * and shall expend the amount so subscribed within the limits of Green county," were conditions precedent to the issue of the bonds, or were stipulations imposed upon the Cumberland and Ohio Railroad Company by its acceptance of the subscription. The

> acceptance of a contract or an obligation which also in terms
> 114 imposes obligations upon the obligee and the latter seeks and obtains the benefit of the contract, binds the latter for their performance, although he may not have expressly undertaken to be bound.
>
> Bishop on Contracts 2d Ed. Sec. 203.
> 1 Parsons on Contracts 9th Ed. Sec. 13, n. 1.
> *Storm v. U. S.*, 94 U. S. 76.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of provisions or stipulations a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent it will not be held to be such.

> *Stanley v. Colt*, 5 Wall. 119.
> *Union Stockyards Co., v. Nashville Packing Co.*, 140 Fed. 701, 704.
> *Sohier v. Trinity Church*, 109 Mass. 1.
> *Greene v. O'Connor*, 18 R. I. 56.
> *Scoville v. McMahon*, 62 Conn. 378.
> *Harting v. Witte*, 59 Wis. 285.

"Conditions have no idiom," said Virgin, Judge, in *Bucksport &c. R. Co., v. Brewer*, 67 Me. 295. "Whether they are precedent or subsequent is a question purely of intent and the intention must be determined by considering not only the words of the particular clause but also the language of the whole contract as well as the nature of the act required and the subject matter to which it relates."

Conditions are not favored, and a provision will not be construed as such unless the intention is clear. 6 Am. & Eng. Ency. of L. 502; *Clapham v. Moyle*, 1 Lev. 155; Shep. Touch. 122; *Huff v. Nickerson*, 27 Me. 105.

"Where the language of an agreement can be resolved into a covenant" said Bell, Judge, in *Paschall v. Passmore*, 15 Penn St. 295, 307, "the judicial inclination is to so construe it; and hence it has resulted that certain features have ever been held essential to

> the constitution of a condition. In the absence of any of
> 115 these it is not permitted to work the destructive effect the law otherwise attributes to it."

The question we are now considering was mentioned but not

passed upon by the Supreme Court because it was not included in our request for its opinion. But we think it apparent for many reasons that the performance of these conditions, so-called, was not intended to be required before the delivery of the bonds. The subscription for the stock of the railroad company by a municipality and the issue of negotiable bonds in payment therefor for the purpose of providing means to assist in the construction of a railroad within their limits is a transaction familiar to every one. It is not a transaction whereby the municipality contracts with the company to build a road, but is intended to provide means to assist the company in building it, in consideration of acquiring a part of its stock and of the expected advantages of the road to the community. The statute of Kentucky under which these bonds were issued indicates very clearly as we think that the bonds authorized were expected to be negotiated for the means to use in the construction of the road. It is provided that they shall be payable to the bearer, that they shall have interest coupons attached payable semi-annually in the city of New York and that the bonds shall be payable at a designated time which may be as long as thirty years after their date. They were thus required to possess the attributes of commercial paper adapted to sale in public markets. And the proposition on which the electors of Green county voted followed in all particulars the provisions of the statute. And when it was provided that the company "shall expend the amount so subscribed within Green county," we can not doubt that what was meant was that the proceeds of those bonds should be so used, and not, as has been suggested, that the company should have expended some other money equal in amount to the bonds. Such a construction as would lead to the result suggested would leave the company without the ready means to build the road which it was the purpose to provide for. Moreover, there is a plain distinction made in the proposition voted in the very terms employed. In regard to the requirements we have been last
116 considering, the question was whether the county would subscribe for the stock and pay for it in county bonds upon condition that the company should construct its road as mentioned, but where the proposition comes to the matter of the exoneration from the vote to the other railroad, that was expressly made a condition to the issuance of the bonds or the payment of any part of them. The failure to append this condition to the preceding provisions and the introduction of the positive inhibition here employed are persuasive evidence that a distinction was contemplated in the vote. To bear the construction that the former were intended to be conditions precedent we should need to have the inhibition located in those clauses also. The abrupt change is significant of a difference in purpose.

Other reasons are also suggested by counsel; but we can not doubt that, for those we have mentioned, the proper construction to be given to the proposition submitted to, and authorized by the electors of Green county, is that the railroad company should, upon its acceptance of the subscription, and the delivery of the stock by one, and of the bonds of the other, come under an obligation to comply

with those terms of the proposition voted. And we reach the conclusion without regard to the question of an estoppel arising upon the fact that the county accepted the stock and has continued to retain it. If the question of the intention were in doubt, the interpretation given by the county to its vote by paying the interest would be persuasive of its understanding at the time of the transaction. We think the bonds were lawfully issued, and that the fact that the company has not performed the stipulations of the agreement which it made as a consideration for the bonds does not invalidate them, when as appears, the delivery of the bonds was final, and they have passed into the hands of other parties for value, as it was the evident intention of the statute that they would do. We need not inquire whether the county could have made a partial defence against these bonds upon the ground that there had been a partial failure of consideration if the railroad company had held them and were now bringing suit upon them. The holder of negotiable paper is entitled to the benefit of the presumptive
117 *prima facie* that he or some previous holder whose title he has acquired it in good faith and for value before maturity in the usual course of business and without notice of any circumstances impeaching its validity; and that he is the owner thereof, if it is payable to bearer. 1, Daniel on Neg. Inst. Sec. 812. Nothing is here shown to contravene these presumptions. Of course it must always appear that the obligor was competent in law to incur the obligation, and had in fact incurred it. We do not understand that the absence of a recital in municipal bonds that the conditions to their issue have been complied with deprives them of their character of negotiable instruments or of the ordinary presumptions which attend such instruments.

Recitals of that character relate to the regularity of the proceedings precedent to their issue—and if the recitals cover the necessary facts, conclusively establish it. But when, in a case where there are no such recitals, proof is made that the proceedings were in fact regular, the bonds are entitled to the same presumptions in their subsequent negotiation as if they had contained such recitals.

It is suggested that the finding of the court, "that the plaintiff is a citizen of the State of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court" was intended only to say that the citizenship of the plaintiff was such as to entitle him to sue in the federal court. But this court in its question to the Supreme Court construed this finding to be also a finding that the plaintiff was a *bona fide* holder for value and the Supreme Court certainly so construed it as is shown in the statement of facts, and we have no doubt correctly. That part of the finding of facts had no relevancy to the question of jurisdiction. If she was a citizen of New York and was the holder of the bonds she was entitled to sue. The question of whether she was a *bona fide* holder for value was a question upon the merits of the case.

The phrase which the court below employed was one peculiar
118 to the law of negotiable instruments and ought to be construed in the sense in which it is there employed. But it really is not material. If, as we hold, the bonds were lawfully issued, the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a *bona fide* holder for value.

The judgment of the circuit court must be reversed, with directions enter a judgment in favor of the plaintiff for the amount of the bonds and coupons with interest on the coupons from the time they severally fell due, and interest on the principal of the bonds from that date when the latest coupons thereon severally fell due.

LURTON, *C. J.*, dissenting, said:

I must in this case and contrary to the usual practice of this Court express openly the grounds for my dissent to the conclusions reached in this case.

The county has not obtained a road constructed by the company to whose stock it proposed to subscribe. Its money has been thrown away. This suit involves its probable liability upon an issue of bonds aggregating $250,000.00. This series of bonds with interest already past due aggregate three-fourths of a million. For this the County will obtain nothing. To prevent just such a possible result the legislature provided that subscriptions by counties might be voted conditionally. The conditions which the county demanded were intended to absolutely secure the building of the road. By subtilty of construction, upon which I express no opinion, two of these conditions are said now to be only covenants and, therefore, worthless against an insolvent and non-existent railway company. For at least thirty years the county has denied its liability and refused payment of interest. When this denial had been so long
acquiesced in that the bonds were purchasable for little more
119 than the value of wall paper, as stated at the bar, they are acquired by speculators who now urge that during all this long, long period of repudiation, the defense of the county has been growing weaker and weaker and that time, which usually only fortifies a defensive position, has all this time been making bonds valid which were invalid when issued.

I will not willingly aid in the destruction of the settled principles which tend to the security of commercial paper. Neither will I agree to strain a finding of facts to hold a county upon obligations which in my judgment were never binding either in the forum of law or conscience.

The principal grounds upon which I find myself unable to agree with the Court are these: 1. The opinion and conclusion conflicts with the settled views of the Supreme Court in respect to the most important ground upon which it rests.

Assuming that the mere fact of issuing these bonds by the County Judge was a determination that the conditions had been complied with which authorized their issuance, that determination only raised a presumption in favor of one who should take the bonds before maturity, for value and without actual notice of the real facts of

the case at the date of issuance. This is so because the bonds were without recital. This much was the plain ruling of the Supreme Court in *Buchanan v. Litchfield*, 102 U. S. 278 and *Citizens Savings Ass'n v. Perry County*, 155 U. S. 692.

In this very case we certified the question as to the presumption upon which a purchaser before maturity for value might act in purchasing bonds without recital. Referring to the tendency of some of the earlier cases to deny to bonds in the hands of innocent holders any other defence than want of power, the court said that tendency had been "arrested" by the cases I have cited above which cases it is said held "that the mere facts of the subscription to stock and issue of bonds containing no recitals left it open to the obligor to show that a condition precedent had not been fulfilled." "But," added the court, "these cases in no way conflict with the view expressed by Mr. Justice Story in *Pendleton County v. Avery*
120 and by Mr. Justice Bradley in *Coloma v. Eve*, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one." "Independent of authority such a presumption exists and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly."

My brethren do not, as I read the opinion of the court, accept this as an applicable rule of law or an authoritative decision in this case. It is, in conclusion of an argument in favor of the conclusiveness of facts determined by the County Judge, refusing the delivery of the bonds, herein question said: "his delivery of them without the occurrence of the conditions would be unauthorized and the bonds be void, yet it would seem upon principle, that if the question whether the conditions had been accomplished is one of doubt and uncertainty and it is apparent that the officers who had charge of the issuance of the bonds are to determine the fact of compliance with the condition, his determination would conclude the question and, if in the affirmative, bind the county."

It is evident that the error of the court in the matter I have referred to is after all the real ground of the conclusion reached and its judgment colored by the view before expressed.

2. The conclusion is next placed upon the theory that no subscription had ever been made to the capital stock of the Elizabethtown and Tennessee Railroad Co., although one was authorized. It is stated in the opinion, that although the subscription was voted and the county court ordered its clerk to subscribe for the stock, that "the clerk did not so subscribe." It is also said, that, when the bonds here involved were issued, the said Elizabethtown and Tennessee Railroad Co., had given no token of its acceptance and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified." *Both in this Court and in the Supreme Court this case has proceeded upon the theory that a subscription had been made as authorized.* The condition precedent *presupposes* a subscription had been made from which the County was to be released.
121 The defense has been that it was invalid, because the authority had been delegated to the clerk and that the case of

Mercer, etc. v. The Navigation Co., 8 Bush 300, was an express authority supporting the county judge's assumption that a subscription so made was void as a delegation of power which could not be delegated. The subsequent case of *Shortell v. Green County*, 116 Ky. 108, was an action upon some of the same series of bonds here in issue and the Kentucky court there, assuming that the subscription had been made, distinguished the former case upon the ground, that in the former case the clerk or commissioner had a discretion to exercise while in the case before it he had none, the terms and conditions being settled already. There is no finding that no subscription had ever, in fact, been made by the clerk as directed. The presumption that the clerk, as a public official, correctly discharged his duty ought to stand as well when the presumption operates in favor of the county as it does when its effect is detrimental. The only finding of fact which bears upon the question is the 17th. That reads as follows:

"That no formal or express exoneration of said county from the payment of said last named subscription was ever made or attempted, but nothing further has, up to this date, ever been done, in respect to it, and neither bonds by the county nor stock by the said last named railroad company, have ever been issued or delivered in execution of said orders or under the terms of said subscription."

That plainly assumes that there had been a subscription, not a mere authority to subscribe. What is said as to nothing further having been done, plainly refers to acts subsequent to the subscription. But it is not important that no formal subscription was made by the clerk. He was commanded to do a purely administrative act and he could have been co-erced to do it by writ of mandamus. The liability of the county upon the vote and the order of the county court was the gist of the matter and fastened a lia-
122 bility upon the County from which it required exoneration as a condition precedent to another liability.

3. I disagree as to the effect of the lapse of time since these bonds were issued upon their validity.

I can not agree, that the liability to this plaintiff rested upon any better foundation when he started this suit in 1899 than if he had sued at date of the earliest maturing coupon. The authority to make a subscription at all depended upon the performance of the antecedent condition of exoneration from liability on account of the former subscription to a different company. Yet within thirteen months after the order of the court directing a subscription by its clerk to the Elizabethtown and Tennessee Railroad Co., we find the county judge making the subscription here involved. If the condition precedent had not been performed then, the act was without authority. In payment of this subscription he issued the bonds in suit in batches, beginning in January, 1872, and completing the issue in April of the same year. The bonds bear date of April 1, 1871. Now, neither at the date of the subscription, June, 1869, nor at the date of the bonds April 1871 nor at the date of their issuance between January and April 1872, had the*ir* been any compliance with the condition in respect of exoneration from the prior liability by the

execution of any release, exoneration or through the judgment of any court. The only finding of fact in respect of this condition is the 17th finding of fact set out above. That there had been "no formal or express exoneration" is expressly found. Then upon what facts are we to predicate an exoneration? None are found except the vague statement that "nothing further up to this date (has) ever been done in respect to it, and neither bonds by the county nor stock by the last named railroad company, has ever been issued or delivered in execution of said orders or under the terms of said subscription." The plain meaning is that neither the county nor the railroad company took any further step in pursuance of the subscription. Why? Many reasons may be conjectured. After years of effort to obtain subscriptions enough to carry out the project, the promoters
123 may have become disheartened and finding themselves unable to comply with the conditions, made no issue of shares and no demand of payment of this subscription. But if the lapse of time without demand for payment or tender of stock, *at the date of the issuance of these bonds* was not such as to raise a legal presumption of abandonment or release, the bonds when issued were illegal as having been issued before there had been any release or exoneration, formal or informal, express or implied. If then illegal when did they become good? If the county could not have defended itself when the bonds were issued against its liability upon the Elizabethtown & Tennessee Railroad subscription, would there have been any pretense that this condition precedent had been complied with? Twenty years went by after the Elizabethtown & Tennessee Railroad subscription was made before this suit was brought. How does it happen that from mere lapse of time a defense good when these bonds were unlawfully issued and put upon the market has become ineffectual and the bonds valid, although the applicable evidence then and now is identical?

I have given attention to what is said upon this subject by Mr. Justice Moody, who, referring to the determination of the county judge when he issued these bonds that this condition of exoneration had been complied with, said, that "the fact that for thirty-eight years no one has made any claim against the county on account of its supposed liability to subscribe to the stock of the Elizabethtown and Tennessee Railroad shows conclusively that he was right." But I am unable to regard this as an authoritative point of the opinion. The single question which was answered related only to whether "on the facts found" there was "any presumption" at all that the county had been exonerated. This was answered in the affirmative. It is evident that the court did not mean that a rebuttable presumption of exoneration had become conclusive by lapse of time after the fact of issuance. The effect of the fact, that the railroad company had done nothing must, in reason, be limited to the date of the issue of the bonds.

If the inquiry is, indeed, whether at this date, thirty-eight years after the subscription, the county can now be regarded as relieved
124 from liability, I should say yes. The lapse of time without an action brought to enforce liability would, undoubtedly,

raise a presumption of a release or abandonment. Indeed, the positive statutory limitation of actions would justify a holding that there was no longer an exi-ting liability on account of that subscription.

But, if the subsequent lapse of time is to be given effect, then I insist that the conduct of the plaintiff and his predecessors in title, as well as that of the county, must be taken into account. These bonds were dated April, 1871. They matured in 1891. This suit was brought in 1899. The coupons which matured in 1878 and for each year subsequent are sued upon. Thus for more than 21 years the county has refused to pay interest and for all that time this plaintiff and those from whom he took the bonds have acquiesced in the attitude of the county. Has time been steadily strengthening the claim of the holder and destroying the defense of the county?

4. The question certified assumed that the plaintiff took these bonds *before maturity*. But the only finding in respect to the status of the plaintiff is the first, in these words:

"The court finds that the plaintiff is a citizen of the State of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was then the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

That finding, I think, should be interpreted as applying to the plea to the jurisdiction. That plea was, by agreement, submitted with the other defenses. It plead that the defendant was not the *bona fide* owner of these bonds when this suit was brought, March 28th, 1899, but that the same bonds and coupons had before been in suit in the same court and the suit abated because the then plaintiff, Herman H. Heaton, was a fictitious plaintiff; the real owners being citizens of Kentucky and that Quinlan had acquired the bonds thereafter only for the purpose of giving jurisdiction to the circuit court, the beneficial plaintiffs being citizens of Ken-
125 tucky. Issue was taken upon this plea as to whether the plaintiff was the real owner or only a fictitious plaintiff. The very terms of the finding indicate that the finding was a response to this plea to the jurisdiction. But, if the finding be construed as both a finding in respect to the issue upon jurisdiction and as to the status of the plaintiff as the holder of negotiable paper, it will be most unjust to infer from that finding that the plaintiff acquired these bonds before maturity, as implied by the second interrogatory, or without notice of the defenses of the county. This finding is "*that on March 28th*, 1899," plaintiff was the *bona fide* holder for value of the bonds and coupons sued upon. That date is the date of the bringing of this suit and the finding was enough to support his claim of right to sue in a United States court, there being diversity of citizenship.

5. But if the judgment of the Circuit Court holding that the conditions precedent had not been complied with and that the bonds were invalid is to be reversed, I think common justice requires that there should be no judgment had upon these findings against the County but a new trial awarded. The findings of fact do not cover

all of the issues and upon those to which they are a response are not definite or full enough to justify a judgment in favor of the plaintiff. If it is of any moment whether the plaintiff is constructively chargeable with knowledge of the situation when these bonds were issued, then it is important to know whether he took these bonds before maturity, or, if not whether he has acquired the title of one who did. That he was on March 28, 1899, the *bona fide* holder for value is too indefinite to justify a judgment for him. The same is true in respect to the defense of the statute of limitations. There is no finding upon this and it is not permissible to piece out defective findings. An examination of the pleadings will show that a large proportion of the coupons in suit matured prior to 1884. Obviously the defence of the Statute of Limitation was a good defence unless the plaintiff can in some way show that it ought not to apply to him. But there is no finding as to this defence. Why shall the County be cut off from the benefit of
126 this defence by refusing to award a new trial and the direction of a judgment upon the bonds and coupons in suit.

When a jury has been waived and a judgment rendered upon a special finding of facts, this court, if it find that the judgment was erroneous, has the power to direct such judgment to be entered as the special findings require, instead of awarding a new trial. *Fort Scott v. Hickman*, 112 U. S. 150. But if the findings are doubtful, obscure or defective, it is within the power of the court and its high duty, whenever justice seems to require such action, to reverse and remand for a new trial. *Graham v. Bayne*, 18 How. 60; *Flandere v. Tweed*, 9 Wall. 425; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; 104; *Ward v. Cochran*, 150 U. S. 597, 608. No judgment ought to be rendered when the findings are silent as to a fact which is essential to a judgment. An imperfect finding like an imperfect special verdict can not be pieced out. The burden is upon him who asks a judgment to produce a finding of every fact necessary to support it. *Hodges v. Easton*, 106 U. S. 408. In *Ward v. Cochran*, cited above, there was a special verdict in an action of ejectment reversed and a new trial awarded because there was no finding that the defendant's possession was adverse and exclusive, although there was a finding that the defendant and his grantors had entered into possession of the land in controversy under a claim of ownership and that he remained in the open, continued, notorious and adverse possession thereof for the period of sixteen years. Without comment we adopted this course in *Anderson v. Messenger*, 146 F. R. 179. In *Barber v. Cox*, 118 F. R. 272, we remanded an appeal for further evidence, upon our own motion, "because great injustice might be done if the case is to be decided upon the present record."

When the findings of fact do not support a judgment against the plaintiff there can be no judgment for the defendant, upon a writ of error sued out by the plaintiff, where there is an issue made by the defendant, material in character, upon which there is no finding of fact. *Exchange Nat. Bank v. Third Nat. Bank*, 112

U. S. 276, 293. When the trial court makes no finding upon
127 an issue made by the pleadings, because it was deemed unimportant, a court of review will remand for a finding upon the facts bearing upon that issue, if found to be material to a judgment, although all of the evidence relating to the question is in the record. In *City of Abilene vs. Cornell University*, 118 F. R. 379, 382, the Circuit Court of Appeals for the Eighth Circuit said of such situation: "We might possibly look into the rejected record and depositions and determine the issue arising on the plea, but by so doing we would be trying on appeal an issue that was not tried below."

Where an omission to make a specific finding of fact is due to the fact that the circuit court made a ruling upon a matter of law which rendered such a finding unimportant, it is the duty of the court, that justice may be done, to reverse and remand, under section 71, R. S., for such further proceedings to be had in the inferior court as justice may require. *Little Miami Railroad Co. v. United States*, 108 U. S. 277, 280.

128 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of Mary Amis Quinlan, Executrix, etc., *vs.* Green County, Kentucky, No. 1440, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 17th day of March, A. D. 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

129 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Mary Amis Quinlan, Executrix of Leonard G. Quinlan, deceased, is plaintiff in error, and Green County, Kentucky, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error — the Circuit Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,
130 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of May, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals, Sixth Circuit, *ss:*

I, Frank O. Loveland, Clerk of the Circuit Court of Appeals for the Sixth Circuit do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court. In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 9th day of May, 1908, there was filed in my office a stipulation in the above entitled case in the following words, towit:

"United States Circuit Court of Appeals for the Sixth Circuit.

1440.

MARY A. QUINLAN, Executrix of Leonard G. Quinlan, Deceased, Plaintiff in Error,
vs.
GREEN COUNTY, KENTUCKY, Defendant in Error.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the

petition for the writ of certiorari be taken as a return to said writ dated the 6th day of May, 1908.

Dated the 8th day of May, 1908.

EDMUND F. TRABUE,
Counsel for Mary A. Quinlan, Ex't x.
ERNEST MACPHERSON,
Counsel for Green County, Kentucky.

I further certify that the above is a true and correct copy of the said stipulation and of the whole thereof.

Witness my official seal and signature and the seal of the said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said Circuit this 20th day of May, 1908.

[Seal of United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals, Sixth Circuit.

131 [Endorsed:] File No. 21,117. Supreme Court of the United States. No. 714. October Term, 1907. Green County, Kentucky, *vs.* Mary Amis Quinlan, Executrix, &c. #1440. Writ of certiorari. Filed May 9, 1908. Frank O. Loveland, Clerk.

132 [Endorsed:] File No. 21,117. Supreme Court U. S. October Term, 1908. Term No. 351. Green County, Kentucky, Petitioner, *vs.* Mary Amis Quinlan, Executrix, &c. Writ of certiorari and return. Filed May 22d, 1908.

Office Supreme Court, U. S.
FILED.
OCT 13 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the ~~United States.~~

OCTOBER TERM, 1908

GREEN COUNTY, KENTUCKY, - - - - - *Petitioner,*

vs. No. ~~711.~~ 351

MARY A. QUINLAN, EXECUTRIX OF LEONARD G. QUINLAN, DECEASED, - - - - - - *Respondent.*

GREEN COUNTY, KENTUCKY, - - - - - *Petitioner,*

vs. No. ~~715.~~ 352

JOHN THOMAS, ET AL., - - - - - - *Respondents.*

MOTION TO ADVANCE FOR HEARING.

Respondents join in a motion to the court to advance the above entitled cases for hearing under Rule 26, and show:

Each of the above styled actions was brought to recover on bonds and coupons claimed to have been issued by petitioner in aid of the construction of railroad of the Cumberland & Ohio Railway Company. The liability of the petitioner upon these bonds was contested upon the ground, among others, that the bonds were payable upon conditions which were unfulfilled; and certain other questions as to the abatement of the action were raised in the second of the above entitled causes. Both actions were instituted many years ago in the United States Circuit Court, District of Kentucky, at Louisville. Final judgments were there rendered against respondents.

Writs of error were prosecuted to the United States Circuit Court of Appeals, which court, after oral and written argument, certified to this court in case No. 714 two questions, one of which was answered by this court on the 8th day of April, 1907, reported in *205 U. S. 410, Quinlan* v. *Green County, Kentucky* (Record, 60). The Circuit Court of Appeals held on the docket the second of the above entitled cases, No. 715, awaiting the determination of these questions in the first entitled case. Afterwards, to-wit, on December 3, 1907 (R. 74), the Circuit Court of Appeals reversed the judgment of the Circuit Court, Kentucky, in the first entitled cause, and pursuant to its mandate judgment was entered for respondent in the Circuit Court. Afterwards the Circuit Court of Appeals reversed the judgment in the second entitled cause, but before any judgment was entered in favor of respondent in the Circuit Court, to-wit, on May 4, 1908, this court granted the petitioner in each case a writ of *certiorari*, so that the first of these cases now stands upon this court's docket for the second time, and the second of these cases is one which should be heard with the first case, although, as stated above, it involves certain other questions.

Wherefore, under Rule 26, respondents move the court to advance the hearing of these two causes.

EDMUND F. TRABUE,
GEO. DURELLE,
Counsel for Respondent in Case 714.
ALEXANDER POPE HUMPHREY,
Counsel for Respondents in Case 715.

Green County, Kentucky, waives notice of the foregoing motion and has no objection to the advancement of the cases.

ERNEST MACPHERSON,
Attorney for Petitioner.

351.

Office Supreme Court,
FILED.
APR 16 1908
JAMES H. McKENNEY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1907.

GREEN COUNTY, KENTUCKY, - - - Petitioner,

versus

MARY A. QUINLAN, Executrix of
Leonard G. Quinlan, deceased, - Respondent.

PETITION FOR CERTIORARI.

ERNEST MACPHERSON,
For Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS.

SIXTH CIRCUIT.

October Term, 1907.

Mary Amis Quinlan, Executrix of Leonard G. Quinlan, deceased, *plaintiff in error*,
vs.
Green County, Kentucky, *defendant in error*.
} Notice.

Plaintiff in error is hereby notified that defendant in error will, on Monday, the 27th day of April, 1908, upon its verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, to the Supreme Court of the United States, in its court-room at the Capitol in the city of Washington, D. C., for a writ of certiorari or other process addressed to the United States Circuit Court of Appeals for the Sixth Circuit, and commanding it to certify to the Supreme Court for its review and determination the records in this case.

ERNEST MACPHERSON,
Counsel for Defendant, Green County.

The foregoing notice is hereby accepted, and delivery of a copy thereof and of the motion and of the petition for the writ of certiorari and brief in support of the petition are hereby acknowledged. This 14th day of April, 1908.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

THE SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

Green C[illegible]nty, Kentucky, *Petitioner*,
vs
Mary A. Quinlan, Executrix of
Leonard G. Quinlan, deceased, *Respondent*.
} Motion.

Comes now Green County, Kentucky, by Ernest Macpherson, its counsel, and moves this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the respondent, Mary A. Quinlan, executrix of Leonard G. Quinlan, deceased, was plaintiff in error, and your petitioner, Green County, Kentucky, was defendant in error, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ERNEST MACPHERSON,
Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

Green County, Kentucky, *Petitioner*,
vs.
Mary A. Quinlan, Executrix of
Leonard G. Quinlan, deceased, *Respondent*.
} Petition.

Petition for the writ of certiorari requiring the United States Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court of the United States for its review and determination the writ of error taken by Mary A. Quinlan, executrix of Leonard G. Quinlan, deceased, against Green County, Kentucky.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Green County, Kentucky, respectfully represents as follows:

I.

Leonard G. Quinlan, a citizen of New York, respondent's testator, brought an action in the Circuit Court of the United States for the Western District of Kentucky upon certain bonds and coupons purporting to have been issued by the petitioner, Green County.

The material parts of the charter of the Cumberland & Ohio Railroad, in aid of which the bonds were supposed to be issued, are printed as an appendix to the brief in support

of this petition. By the terms of the charter, "the said railroad company may receive subscriptions of stock to their company, by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment conditions annexed and kind of payment, that may be set forth in the subscription."

The case was tried without a jury, and the court, after finding certain facts, but not passing upon all the questions raised by the defendant in the pleadings, gave judgment for Green County.

The court found that the proposition submitted to the voters of the county, and which was by them affirmatively decided, was whether "said county court shall subscribe for and on behalf of said county, $250,000 to the capital stock of the Cumberland & Ohio Railroad Company, and payable in the bonds of said county, having twenty years to run and bearing 6 per cent. interest from date and upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County, and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon"; that the County Judge of Green County, in pursuance of the vote, had entered an order of subscrip-

tion, which subscription is to be paid in the bonds of said county as prescribed in said order of subscription, and this subscription is made with the condition set out in the order of this court ordering said election and now of record in the office of the county; that the County Judge had entered an order for the printing of the bonds, which order prescribed that the same (the bonds) to be conditioned as specified in the order submitting the vote to said county; that bonds to the amount of $250,000, not containing any conditions or recitals, were issued, and that the county received a stock certificate; that the bonds and coupons sued on were of this issue; that only about five miles of the railroad were ever constructed in the county; that the proceeds of $150,000 of bonds only were expended within the limits of the county on certain grading, bridging and tunneling, when the work was abandoned for some years and was afterwards, as to the five miles, completed by another road at its own expense; that the plaintiff, Quinlan, knew when he purchased the bonds that the road had not otherwise been built; that no formal or express exoneration of the county from the subscription to the Elizabethtown & Tennessee Railroad had ever been made or attempted, though nothing further had been done in respect to it, and that none of the conditions had been fulfilled.

The petition was dismissed.

II.

The case was then taken to the United States Circuit Court of Appeals for the Sixth Circuit and, after argument, was certified on the facts found by the circuit court to this court. Quinlan's Executrix v. Green County, 205 U. S.,

410. Thereupon your petitioner moved the Circuit Court of Appeals to modify or change the second of the two questions propounded so far as it assumed that Quinlan was a purchaser before maturity of the bonds or coupons sued on, as the record did not show that he was such a purchaser, and it was not a fact; and in support of the motion petitioner's counsel filed an attested copy of the deposition of Quinlan himself as read in the circuit court, which showed that he had obtained the bonds and coupons long after their maturity, knowing they were in default, and for a merely nominal price. The record also showed that these identical bonds and coupons had twice before been sued on by other plaintiffs in the circuit court and the suits dismissed because frauds on the jurisdiction.

This motion in the Circuit Court of Appeals was overruled.

III.

In Quinlan's Executrix v. Green County, *supra*, Your Honors declined to answer the first question, and said:

> "Construing the second question to inquire not whether there is a conclusive presumption, but whether on the facts found there is any presumption at all that the county had been exonerated from its former subscription to another railroad, we answer it, 'Yes.'"

IV.

Upon the return of the answer, the case was reargued in the Circuit Court of Appeals, and on the 19th of December, 1907, an opinion (Circuit Judge Lurton dissenting in writing) was delivered reversing the judgment of the

circuit court and directing a judgment for respondent on all the bonds and coupons sued on, inclusive of those coupons, amounting to many thousands of dollars, which were barred by limitation, plea of which was properly made. The majority of the Circuit Court of Appeals also decided, in substance, that the mere issuance by the county of bonds, although containing no recitals or mention of laws or orders to which they must conform, made the county liable on the ground that a condition precedent to their issuance had been performed, although the circuit court found as a fact that there had been no performance of the condition, and substantially that when a case was tried to the court without a jury, only the facts found by the circuit court could be considered, and this in a case where judgment was rendered for the defendant, and the record showed other meritorious defenses not passed upon by the circuit court. And the majority of the court also held that respondent's testator was not bound by the conditions or covenants contained in the contract as shown upon the records of the county court.

V.

Your petitioner respectfully submits that this petition should be allowed also because of the large sums of money involved—over $85,000 of bonds and coupons in this case, which were obtained by respondent's testator for less than 1 per centum on the dollar, as shown by his own testimony in his answers to questions 15 and 16 in his deposition—and because the amount involved in this case and in the case of John Thomas and Others v. Green County, in which latter case a like motion and petition unto these are con-

currently made to Your Honors, are equal to, if not quite one-fourth of the entire property of the county, and this should seem to make this petition worthy of consideration as a matter of gravity and importance—certainly so to your petitioner—and because the Court of Appeals of Kentucky, in Green County v. Shortell, 116 Ky., 108, by the unanimous opinion of the six judges participating in the case held the bonds and coupons of this series to be invalid, and because of the four Federal judges who have passed upon the cases in the United States Circuit Court and in the Circuit Court of Appeals for the Sixth Circuit two gave opinions in favor of the county, and because "a majority" of this Honorable Court, in Quinlan v. Green County, *supra*, 205 U. S., 410, even in the meager record then before the court, thought there were other questions than that which was answered; and because the Circuit Court of Appeals ordered judgment against your petitioner for bonds and coupons barred by limitation, plea of which was timely made; and petitioner insists that the case if properly reversible should have been remanded with orders for a new trial.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled in that court, Mary A. Quinlan, Executrix, Plaintiff in Error, v. Green County, Kentucky, Defendant in Error, No. 1440, to the end that the said case may be reviewed and determined by this court, as provided

in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner should have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with said act, and that the judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

GREEN COUNTY, KENTUCKY,
By ERNEST MACPHERSON, *Counsel.*

Commonwealth of Kentucky,
County of Jefferson. } *ss.*

Ernest Macpherson, being duly sworn, says he is of counsel for Green County, Kentucky, the petitioner; that he prepared the foregoing petition, and that the allegations therein are true, as he verily believes.

ERNEST MACPHERSON.

Subscribed and sworn to by Ernest Macpherson before me this 14th day of April 1908. My commission expires February 12, 1910. GEORGE A. BRENT,
(SEAL) *Notary Public, Jefferson County, Kentucky.*

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

Green County, Kentucky, *Petitioner*,
vs.
Mary A. Quinlan, Executrix of Leonard G. Quinlan, deceased, *Respondent*.

Brief in Support of Petition.

I.

Counsel for petitioner makes the dissenting opinion of Circuit Judge Lurton, delivered in the Circuit Court of Appeals, a part of this brief; the opinion is in the record.

II.

The purchaser of municipal bonds is always bound to know the law under which they are issued.

III.

> "Where bonds purporting to have been issued by a municipality contain no recitals of an election or of proceedings or orders of the municipality, but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records."
>
> Hainer, Municipal Securities, sec. 413.

In Crow v. Oxford, 119 U. S., 222, this court said:

> "Even though the plaintiff purchased the bonds and coupons, as the finding of facts says, 'before

> their maturity for value, without actual notice of any defense to them,' he was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds."

Quinlan was bound to know that under the terms of the contract the county was to be liable only if (1) "the road should run through Green county, (2) and within one mile of the town of Greensburg, and (3) two hundred and fifty thousand dollars should be expended within the limits of the county, and (4) that all this should be done within ten years from the date of the charter, February 24, 1869," for by its terms, unless the road should be completed within ten years, the franchises and powers of the Cumberland & Ohio Railroad were to be forfeited. Appendix, sec. 18.

The terms of the contract, as shown by the orders of the county court, were part of the bonds, as though fully set forth therein. The order directing the printing of the bonds provided that "the same to be conditioned as set forth in the order of subscription." It did not say that the bonds were to be issued upon the condition of exoneration from a former subscription, but said that "the same," meaning the bonds themselves, were to be conditioned.

It matters not whether the conditions so called were precedent or subsequent, or whether they were covenants between the road and the county, they were called "conditions" in the contract and were to be inserted in the language of the bonds, and every purchaser was by law required to know and be bound by this contract.

In none of the cases relating to municipal bonds decided

by this court, from Knox v. Aspinwall, 62 U. S., 539, to Quinlan v. Green County, 205 U. S., 410, has there been a decision at variance with the principles herein contended for. This court has never decided that a municipality might not issue a conditional bond, and the argument that the sale of the bonds was necessary in order to complete the road, and that a conditional obligation could never have been in the contemplation of the parties, is fallacious for the conclusive reasons that it ignores the terms of the charter, the terms of the contract, and the fact that the charter authorized a large capital outside of municipal subscriptions, and it assumes that the Green county bonds, at the time of their issuance, or ever, sold for anything like the par value, which was not proven in the circuit court and will not be claimed by the attorneys for the bondholders.

IV.

In Quinlan, Executrix, v. Green County, 205 U. S., 410, one only of the orders of the county court issuing bonds was before Your Honors. This order contained the phrase "being sufficiently advised," and the phrase was construed as implying that the bonds were issued only after a judicial determination that the conditions authorizing their issuance had been fulfilled. This inference is repelled by the record now before the court, which contains the first order issuing bonds, and in this first order there is nothing about the court being advised sufficiently or at all.

V.

If this case should have been reversed by the Circuit Court of Appeals, a new trial should have been ordered and the Circuit Court of Appeals should have passed upon

a ruling made in the circuit court against your petitioner. In the circuit court the record shows that your petitioner pleaded in abatement of the suit of Quinlan as follows:

> "And defendant, Green County, further says that each and all of the bonds and coupons herein sued on as belonging to plaintiff, Quinlan, are parts of the bonds and coupons that were heretofore sued on in this Honorable Court by one Herman H. Heaton, a citizen of Indiana who was himself not the owner of the bonds or coupons by him sued on. Said suit was numbered in this court No. ——, and upon proper plea in abatement filed in said action of Herman H. Heaton v. Green County showing that he was merely a fictitious plaintiff and not the owner of said bonds said action was dismissed; and defendant further says that thereafter each and all the bonds and coupons herein sued on were sued on in this Honorable Court by one Samuel W. Simmons, claiming to be the owner thereof and a citizen and resident of the State of Texas, and in said action of Simmons against this defendant, which was numbered in this court No. ——, upon proper plea in abatement filed in said action, and upon issue joined thereon and proof taken, the said Simmons testified that he was the lawful owner and holder of said bonds and coupons, parts of which are herein sued on, but this Honorable Court, upon full hearing, sustained the plea of this defendant because and for that the said Simmons had fraudulently acquired the ownership of said bonds for the purpose of bringing suit in this Honorable Court. And defendant

further says that the suit of Heaton hereinbefore mentioned against this defendant, and the suit of Simmons, heretofore mentioned against this defendant, and this suit is, are and each of them were brought by the same attorney, whose name is signed to the petition in this case. And defendant further says that the plaintiff in this case was induced and first applied to bring this suit, either by said same attorney or by a broker of this city who is also interested in said Green County bonds and coupons which broker is a brother-in-law of said plaintiff, and said plaintiff well knew when he obtained the fictitious title aforesaid, or any title he has, that said bonds were not salable upon the market, having been repudiated by said county."

This part of the plea was stricken out in the circuit court. It is submitted that if the case should have been reversed, the Circuit Court of Appeals should have passed upon the question whether these facts were relevant on the question of the *bona fides* of Quinlan.

It was stipulated in the record that Quinlan obtained the bonds from citizens of Kentucky. His own deposition shows that he bought them for a song, and it will not be contended in face of the record now before this court that Quinlan was a purchaser before maturity. Quinlan's deposition, answers 26, 27, 28.

VI.

The circuit court, in its finding that Quinlan was a holder for value of the bonds, did not intend to use those words in the sense of the commercial law, but merely that he had

paid something for the bonds, and it is evident from the record that the Circuit Judge made his finding solely in reference to the plea of Green County that Quinlan was not the owner of the bonds at all and regarded that question as immaterial, as the court considered that the petition should be dismissed for other meritorious reasons.

The findings not being sufficiently specific, the Circuit Court of Appeals, if it reversed the case, should have remanded it for further inquiry and such further proceedings in the court as the justice of the case may require. Little Miami R. R. Co. v. United States, 108 U. S., 277.

VII.

It was clearly erroneous to direct a judgment for the coupons barred by limitation.

It is respectfully submitted that the case is one which ought to be reviewed.

ERNEST MACPHERSON,
For Petitioner.

APPENDIX A.

An act to incorporate the Cumberland & Ohio Railroad Company, Acts 1869, vol. 1, p. 463:

Sec. 15. "That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and board of aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per centum per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, the mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock

in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed; and the mayor and aldermen, or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the county court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns or counties, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the cost of collecting the same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this they may establish a sinking fund, and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by law, or may adopt such other means as to them may seem proper and expedient; and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns or counties, under whose subscription the tax is levied, shall be divested of stock to the extent of stock issued on said tax receipts; and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, a certificate of stock shall

be issued for a fractional part of a share: *Provided*, That the said cities, towns or counties shall receive no dividends on their stock, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends and to all the rights and privileges as the original and cash stockholders. *And provided further*, That said company may, in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year. *And provided further*, That the company may purchase said bonds and surrender them at any time to the cities, towns or counties issuing them, and have the same cancelled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the county court of any county having jurisdiction, may appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns, or counties within the jurisdiction of same to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of the State revenue. The mayor and aldermen, or chairman and board of trustees, shall require and take from the person collecting the tax a bond, with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay the State revenue, and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. That, if preferred, the application herein authorized to be made to the county

court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court. . . ."

Sec. 18. "They (the Cumberland & Ohio Railroad Company) shall begin work on their road, in good faith, within three years, and complete the same within ten years from the passage of this act or forfeit the powers and franchises herein conferred."

Section 16 of the charter closes with these words:

"And (the Cumberland & Ohio Railroad) shall have all the powers and privileges conferred upon said Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad, not herein specified and granted, and not in conflict with the terms of this charter."

Sub-section 6 of section 1 of "Act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1858 (1 Acts 1855-6, page 181), declares:

"That said railroad company may receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription," etc.

Office Supreme Court, U. S.
FILED.
APR 24 1908
JAMES H. McKENNEY,
Clerk.

The Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 351.

GREEN COUNTY, KENTUCKY, - - - *Petitioner*,

v.

MARY A. QUINLAN, EXECUTRIX OF LEONARD G. QUINLAN, Deceased, - *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A CERTIORARI.

EDMUND F. TRABUE,
GEORGE DURELLE,
Counsel.

JOHN C. BOOLAN,
ATTILLA COX, JR.,
Of Counsel.

The Supreme Court of the United States

OCTOBER TERM, 1907.

No. 714

GREEN COUNTY, KENTUCKY, - - - - - - *Petitioner,*

v.

MARY A. QUINLAN, EXECUTRIX OF
LEONARD G. QUINLAN, Deceased, - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A CERTIORARI.

Plaintiff in error in opposition to the petition aforesaid, says:

1. That the Circuit Court did not fail, as claimed by petitioner, to pass upon all the questions raised by the pleadings; although plaintiff admits that the court did not make a finding upon the question of limitation, there being no controversy as to what coupons were barred by limitation; and the final judgment entered in the Circuit Court after reversal, and pursuant to the mandate of the Circuit Court of Appeals, expressly remits all coupons barred by limitation, and the *remittitur* was made pursuant to the mandate because the mandate directed judgment only for such coupons as were "due." The mandate declared:

> "The case is remanded to the Circuit Court with directions to enter a judgment for the plaintiff for the sum due on the bonds and coupons in suit."

Accordingly, the judgment recites:

> "Came also the said plaintiff and in open court expressly remitted all of the plaintiff's claim in the petition herein asserted in excess of the sum of $89,195.52 hereinafter mentioned, said excess being the amount of coupons maturing more than fifteen years before the commencement of this action, and being therefore barred by the Statute of Limitations."

A certified copy of the judgment is filed with this brief as Exhibit A.

This point, therefore, raised by Judge Lurton's dissenting opinion, and by the petition for *certiorari*, is eliminated.

2. The remaining point, *to-wit*, that decedent Leonard G. Quinlan was not a *bona fide* holder, is now pressed upon evidence alleged *de hors* the record of the Circuit Court of Appeals.

This case has been litigated in the Circuit Court, the Circuit Court of Appeals, in this court upon a certification (*205 U. S. 410*), and afterward in said Circuit Court of Appeals again, upon response from this court, and petitioner's contention has now dwindled into a contest based upon matters alleged *de hors* the record of the court to which the *certiorari*, if issued, would run.

The Circuit Court's findings of fact were very full, and circumstantial. Except the matter of limitation just explained, there is no intimation that the Circuit Court failed to pass upon any issue except as to said Quinlan's being a *bona fide* holder for value, and petitioner's contention on this point is refuted by the findings, themselves, of record. It is conceded that the Circuit Court found upon the entire evidence in the case that Quinlan was a "*bona*

fide holder for value," but it is contended that it has been discovered that the Circuit Court in such finding had a meaning, or intention, exactly the reverse of the finding. This is refuted by the opinion of the Circuit Court of Appeals; *157 Fed. R. pp. 42, 43* (having no copy of record in this court we can not give paging).

Moreover, had the Circuit Court omitted, or overlooked, anything, presumably it would have corrected it on motion, or even upon suggestion.

Although the finding existed and defendant had judgment thereon in the Circuit Court, and in the Appellate Court demanded an affirmance of the Circuit Court's judgment on the finding, and although the writ of error to said judgment was elaborately argued in the Circuit Court of Appeals, no intimation came from petitioner that the Circuit Court had overlooked any issue, or entertained any intention or meaning contrary to its express finding until after the three Judges of the Court of Appeals, *viz.*, Hon. Horace H. Lurton, Hon. Henry F. Severens and Hon. John K. Richards, had certified to this court the two questions, one of which was answered, reported in *205 U. S. 410*. In such certification the three Judges of the Appellate Court certified the two questions aforesaid upon the assumption, based upon the Circuit Court's finding, that said Quinlan was a *bona fide* holder for value, and overruled defendant's motion to so correct the said finding as to eliminate the assumption in said certified questions that said Quinlan was a *bona fide* holder.

Not only did the Court of Appeals certify, but this court answered, upon said assumption as so certified to it by the Court of Appeals after that court had overruled defendant's motion to correct the certification; so that it is quite remarkable to now request a *certiorari* based upon the assumption

that the Circuit Court meant exactly the reverse of what it found as a fact, and what was assumed to be a fact in all subsequent litigation. Petitioner not only made no motion in the Circuit Court for a different finding, but permitted a hearing in this court upon the questions certified by the Court of Appeals and made no application to this court for a *certiorari* at that time.

The Court of Appeals, on return of this court's answer to one of that court's certified questions, said concerning the present contention, *157 Fed. R. 42:*

> "The holder of negotiable paper is entitled to the benefit of the presumption prima facie, that he or some previous holder whose title he has acquired is a purchaser in good faith and for value before maturity, in the usual course of business, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, if it is payable to bearer. Daniel on Neg. Inst., § 812. Nothing is here shown to contravene these presumptions."

As further said, however, by the Court of Appeals:

> "But it (the question) really is not material. If, as we hold, the bonds were lawfully issued, the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a bona fide holder for value."

3. Petitioner's learned counsel in his brief, *Item IV*, makes a subtle point on the verbiage of the three orders of the County Court (*C. C. A. Record, p. 45*), *viz.*, that only one of those orders recited "the court being sufficiently advised." We shall not enter into an extended discussion of these orders upon this point. It is hardly a legitimate

inference that the court meant by the omission of the recital in the other orders to imply *that they were made without the court's being sufficiently advised.* Apparently, however, there is nothing else in petitioner's contention.

4. The able dissenting Judge seems irreconciled to plaintiff's recovery because she has been so long in obtaining it, and because the county is supposed to be liable in the event of her recovery to so large a sum of money. Except a discussion of the verbiage of some of the orders for subscription, the learned Judge's dissenting opinion is based entirely upon surmises *de hors* the record. His conjecture, for example, that the county, if liable to plaintiff, would be compellable to pay $750,000.00, is pure conjecture, and is remarkable in view of the fact that no other bonds were known to be outstanding, except those in issue in this case and in *Thomas v. Green County* submitted with this case. In *Shortell v. Green County,* cited in the dissenting opinion, the State Court invalidated the bonds there in issue. How many more are barred by limitation without suit does not appear. All bonds not suable in the Federal Court are uncollectible because of the Shortell decision.

It does not appear how great a burden,under $750,000.00, the dissenting Judge would approve of Green County's sustaining, but presumptively he would not object to its sustaining a burden equivalent to the proceeds of the $150,000.00 bonds spent in Green County, and the bonds of Quinlan and of Thomas *et al.*, opponents to these petitions, aggregate less than two thirds of $150,000.00. Of course, interest has accumulated, except as barred by limitation. The only remedy for prevention of the accrual of interest is payment of interest. These suggestions are based upon the record, and not, like the dissenting opinion, upon surmises refutable by irresistible inferences.

Again, in *Shortell v. Green County*, the State Court first held the County's answer demurrable; *22 Ky. L. R. 1010; 59 Southwest. Rep. 522*, and also on petition for a rehearing so held in *23 Ky. L. R. 144; 63 S. W. 979*, and remanded the case for further proceedings, and subsequently held the bonds void, *116 Ky. 108*. The learned Judge, now dissenting, takes no note of the hardship upon such bondholders as may, peradventure, have purchased bonds after the State Court held the County's answer insufficient. The original purchaser and his vendees are entitled to the benefit of the market, and presumably a market temporarily existed pending the vacillation of the highest State Court upon the question of the validity of the bonds.

5. Upon the first question certified to this court by the Court of Appeals and elaborately argued here, orally and by brief, and twice elaborately argued in the Circuit Court of Appeals, orally and by brief, and so admirably expounded in the opinion of the latter court, *157 Fed. R. 37, et seq.*, we shall inflict no further discussion; and shall, of course, make no further argument upon the question answered by this court, *205 U. S. 410*.

If plaintiff's judgment should remain unimpaired, nevertheless, whether or not she could ever enforce it is a question which the future must answer; *Campbellsville Lumber Co. v. Hubbert, 112 Fed. R. 718, 50 C. C. A. 435*. Certainly there ought to be an end of litigation. Petitioner might have presented this petition when the Circuit Court of Appeals certified its questions to this court, but apparently preferred to take its chances upon the record as it stood.

We respectfully pray that the petition be denied.

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GEORGE DURELLE,
Counsel.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

DEC 7 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1908.

NO. 351

GREEN COUNTY, KENTUCKY, - - Petitioner,

vs.

MARY A. QUINLAN, executrix of last will of Leonard G. Quinlan, deceased, - Respondent.

Brief of Argument for Petitioner.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel for Petitioner.

GEO. G. FETTER COMPANY, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1908.

NO. 351.

GREEN COUNTY, KENTUCKY, - - Petitioner,

vs.

MARY A. QUINLAN, Executrix of Will of Leonard G. Quinlan, Deceased, - Respondent.

BRIEF OF ARGUMENT FOR GREEN COUNTY.

This case is before the court on writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision reversing a judgment of the United States Circuit Court for the Western District of Kentucky in favor of Green county, Kentucky, in a suit by Leonard G. Quinlan on certain bonds and coupons purporting to have been issued by that county for the old Cumberland & Ohio Railroad Company.

To the petitioner the case is of such great importance as to seem to counsel to justify, even at the risk of prolixity, a somewhat full and particular statement.

The facts will be best understood by stating them in connection with the pleadings and with certain provisions of the statutes or charters creating the Elizabethtown & Tennessee Railroad Company and the Cumberland & Ohio Railroad Company.

The Elizabethtown & Tennessee Railroad Company was incorporated by an act of the General Assembly of Kentucky, approved February 19, 1868 (Acts, 1867-8, Vol. 1, p. 560).

At page 568 is section 17, which prescribes the procedure of county officials after the submission of a question of subscription to and election held by the voters of the county. The section reads:

> "That the person acting as sheriff at the several precincts shall return to the clerk of the county court within (3) three days after the day of such election the poll books of their respective precincts; and on the next day thereafter the county judge and county clerk shall count the vote, and if it shall appear that the majority of those voting voted in favor of the subscription of stock as proposed, the county judge shall order the vote to be entered on the record, and the subscription be made by the clerk, on behalf of the county, on the terms specified in the order submitting the question to a vote."

Thereafter, and in literal compliance with these directions of the law, this order (Record, 34) was entered in the Green County Court:

> "1868. Green County Court. May called term, 1868; 20th day of May. Present: T. R. Barnett, Judge.
>
> "This day, T. R. Barnett, presiding judge, and D. T. Towles, clerk of the Green County Court, this day produced their certificate, in words and figures as follows, viz:
>
> "'We, T. R. Barnett, presiding judge, and D. T. Towles, clerk of the Green County Court, duly authorized to compare the poll books of Green county, certify that at an election held in said county at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county of Green shall, for and on behalf of said county, subscribe for three thousand shares in cap-

ital stock of Elizabethtown & Tennessee Railroad Co., to be paid for in the bonds of said county, payable in twenty years, and bearing six per cent. interest, payable semi-annually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription, May 20, 1868.

"'T. R. BARNETT,
"'D. T. TOWLES.'

"It is, therefore, ordered by the court that the said vote be and is now entered of record, as follows, to-wit: 586 votes were cast for said subscription and 204 votes were cast against said subscription, showing that there is a majority for said subcription of three hundred and eighty-two votes.

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make this subscription in the terms specified in the order submitting the question to a vote, as aforesaid."

The Cumberland & Ohio Railroad Company was incorporated by an act of the General Assembly of Kentucky, approved February 24, 1869, 1 Ky. Sess. Acts 1869, p. 463. So much of this statute as is deemed necessary is printed at length as Appendix A to this brief.

This company was authorized, by section 12 of the charter, to construct and operate a railroad from the Ohio river *through* various counties, including Green, to a point on the boundary line between the States of Kentucky and Tennessee.

By section 15 any city, town or county through which the proposed road should pass was authorized to subscribe stock in the company in any amount such municipality desired, and to issue bonds therefor, payable to bearer, with coupons attached, bearing interest not exceed-

ing 6 per cent. per annum, payable in the city of New York at not more than thirty years from date, but before any such subscription should be valid the question of making it was required to be submitted to the qualified voters of the municipality.

By section 16 the road was given all the powers and privileges conferred by its charter on the Louisville & Nashville Railroad. The charter of that road empowered counties and cities to subscribe for stock "*with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.*"

By section 18 it was required of the Cumberland & Ohio Railroad Company that "they shall begin work on their road, in good faith, within three years, and complete the same within ten years from the passage of this act or forfeit the powers and franchises herein conferred."

Before the expiration of its charter (1879), when it ceased to exist, the Cumberland & Ohio Railroad Company abandoned the enterprise and adopted an amendment to its charter, by which amendment the original road was divided into two "distinct corporations," two short sections, one of which, "the Southern Division of the Cumberland & Ohio Railroad Company," was to own "the section of said road situate between Lebanon, in Marion county, and Greensburg, in Green county"; "each to have the powers conferred" by this act upon the Cumberland & Ohio Railroad Company "so far as applicable to their respective sections." The amendment was careful to preserve the defenses of the counties which in any way were affected by the abandonment of the original enterprise, or for other cause, and enacted, in section 10, that "nothing herein shall be construed to affect the validity or any legal question connected with the bonds

of any of the counties along the line of the road." Sections 6 and 10 of the amendment are printed as Appendix B.

At a June called term, 1869, commissioners representing the Cumberland & Ohio Railroad Company made, not to the county judge, but to the Green County Court, a proposition for a conditional subscription to its capital stock, to be paid in conditional bonds of the county. The proposition, attested copy (Record, p. 35), reads:

> "We, the undersigned, commissioners of the Cumberland & Ohio Railroad Company, hereby request the county court of Green county to submit to a vote of the qualified voters of said county the 'question' whether said court shall subscribe for and on behalf of said county and in pursuance to the provisions of the charter of said Railroad Company two hundred and fifty thousand dollars to the capital stock of said company payable in the bonds of said county having twenty years to run and bearing six per cent. interest from date upon the condition that said company shall locate and construct said railroad through Green county and within one mile of the town of Greensburg in said county and shall expend the amount so subscribed within the limits of Green county and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company."

The record (page 35) shows that this proposition was signed by D. T. Towles, the clerk of the county court, the identical person and clerk who was directed to make the subscription to the Elizabethtown & Tennessee Railroad and shows that there was a subscription to that road and that he had performed his duty. The statement contained an error. It stated that the capital stock had been "subscribed by the county court," whereas the court had, in accordance with the charter of the Elizabethtown road no power to subscribe; this mere ministerial duty was to be done by the clerk. The county court could only authorize a subscription.

On the same day the county judge (attested copy, Record, p. 35) entered this order:

> "Whereas the commissioners of the Cumberland & Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the county court of Green county to order an election in the said county of Green, and submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company having twenty years to run and bearing 6 per cent. interest from date, and payable in the bonds of said county upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg in the said county, and shall expend the amount so subscribed within the limits of Green county and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad

until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green county at the several voting precincts in said county be held and conducted by the several officers as prescribed by law for holding elections on the 3d day of July, 1869, to vote on the question as to whether or not the said County Court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland & Ohio Railroad conditioned and to be paid as above stated."

The vote at the election was in favor of the subscription, and it was "made with the conditions set out in the order of this court, ordering said election and now of record in the office of the county." (Record, p. 36.)

At the October term, 1871 (Record, p. 46), the county judge entered this order:

"On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green county to the said railroad, in the following denominations, to-wit, *the same to be conditioned as specified in the order submitting the vote of the said county:*

"125 bonds at	$1,000.00	$125,000
200 bonds at	500.00	100,000
250 bonds at	100.00	25,000
		$250,000"

The bonds as printed and issued were in the form of plain promissory notes with a seal attached and contained no conditions, as ordered, no mention of the orders of court, or charter of the company, and no recitals whatever.

The bonds were delivered by the county judge to the railroad company under three orders, in January, February and April, 1872 (Record, pp. 37 and 38). The first order (Record, p. 37) reads:

> "On motion, Cumberland & Ohio R. R. Company ordered that the presiding judge of Green county issue the bonds of said county for the sum of thirteen thousand dollars, said sum being a portion of the stock subscribed for and on behalf of said county to said railroad company, said sum being required to pay E. H. Hobson who advanced the money for surveying and locating the road to Greensburg, Ky."

This first order, it will be observed, did not contain the phrase, "the court being sufficiently advised."

The bonds were dated April 1, 1871, and matured April 1, 1891 (Record, p. 48).

On March 28, 1899, Leonard G. Quinlan, of New York, brought suit against Green county on the bonds and coupons set forth in his petition.

These papers were each endorsed as follows: "Filed Oct. 1, 1894; Thos. Speed, clerk. Filed Aug. 30, 1895; Thos. Speed, clerk. Filed March 28, 1899; Thos. Speed, clerk." (Record, p. 15.) It thus appears by these filing marks, and the fact is unquestionable, that the identical bonds and coupons herein involved had twice before been sued on in the same circuit court. The plaintiff, Leonard G. Quinlan, did not in his petition claim that he was a

bona fide purchaser before maturity for a valuable consideration and without notice. His claim read (Record, p. 8):

> "Plaintiff states that he is the holder and owner of the following bonds and coupons, of the following amounts and dates of maturities, to-wit,"

and then set forth the numbers and amounts of the bonds and coupons.

The first paragraph of the answer (Record, pp. 19 and 20) was a plea to the jurisdiction on the ground that the suit was brought in the name of Quinlan for the benefit of others who were the real owners and were citizens of Kentucky. The rest of the answer (Record, p. 25) set forth in detail all the proceedings of the Green county judge and relied on the breach of the contract in relation to the bonds, and included the allegation that the county, at the time the bonds were delivered, had not been exonerated from the prior obligation to the Elizabethtown & Tennessee Railroad. To this part of the answer the plaintiff replied (Record, p. 39):

> "Plaintiff denies that the defendant was never exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said county to the Elizabethtown & Tennessee Railroad, and plaintiff says that defendant Green county was fully and completely exonerated from the payment of its subscription to the capital stock of the Elizabethtown & Tennessee Railroad Company, mentioned in its answer, before the issuance or delivery of the bonds herein sued on or any of them."

The reply then alleged compliance by the Cumberland & Ohio Railroad with all the terms of the subscription. These allegations of the reply were denied in the rejoinder. As to the first subscription, which was admitted by the pleadings, the only issue was whether there had been a full and complete exoneration from the liability before the bonds were issued. Before the trial on the merits in the circuit court, plaintiff Quinlan's then attorney moved the court, and the motion was sustained (Record, p. 22) to strike from the plea in abatement the following words:

> "And defendant, Green County, further says that each and all of the bonds and coupons herein sued on as belonging to plaintiff, Quinlan, are parts of the bonds and coupons that were heretofore sued on in this Honorable Court by one Herman H. Heaton, a citizen of Indiana, who was himself not the owner of the bonds or coupons by him sued on. Said suit was numbered in this court number —. And upon proper plea in abatement filed in said action of Herman H. Heaton against Green County, showing that he was merely a fictitious plaintiff and not the owner of said bonds, said action was dismissed; and defendant further says that thereafter each and all the bonds and coupons herein sued on were sued on in this Honorable Court by one Samuel W. Simmons, claiming to be the owner thereof, and a citizen and resident of the State of Texas, and in said action of said Simmons against this defendant, which was numbered in this court number —, upon proper plea in abatement filed in said action and upon issue joined thereon and proof taken, the said Simmons testified that he was the lawful owner and holder of said bonds and coupons, part of which are herein sued on; but this Honorable Court, upon full hearing, sustained the plea of this defendant because

and for that the said Simmons had fraudulently acquired the ownership of said bonds for the purpose of bringing suit in this Honorable Court.

"And defendant further says that the suit of Heaton, hereinbefore mentioned, against this defendant and the suit of Simmons, heretofore mentioned, against this defendant, and this suit is, and each of them, were brought by the same attorney, whose name is signed to the petition in this case."

There were other allegations in the plea that were also stricken out.

The quoted allegations of fact stricken from the plea were matters of record in the circuit court, which it was bound judicially to know, and the record shows by the motion to strike out that the facts were brought to the attention of the circuit court. To interrupt the statement for one sentence in regard to the law, it was not necessary to plead the facts showing the case was not really a controversy of which the court could take jurisdiction if before final judgment the facts were brought to the attention of the court by affidavits or the depositions taken in the case, or in other ways. Morris v. Gilmer, 129 U. S., 315.

Green County took the deposition of Quinlan himself, to which reference more particularly will be made later in this statement.

Before the trial the parties made a written stipulation, which contained the following:

"It is agreed that all the persons from whom plaintiff obtained his bonds or coupons were, at the time plaintiff obtained them or any of them, residents and citizens of Kentucky."

> "All issues of law or fact are to be tried by the court, and a jury is waived."

The circuit court gave judgment for the county and dismissed the petition, and the findings may be found at pages 44, 45, 46, 47, 48 and 49 of the record. The court found that none of the conditions of the contract had been fulfilled; that no formal or express exoneration of the county from the payment of the subscription to the Elizabethtown & Tennessee Railroad had ever been made or attempted, but that nothing further was done in respect of it; that the proceeds of $150,000 of bonds were spent in the county; that there are only about five miles of railroad in the county, and that about fifteen miles more would be required to run "through" the county; that the Cumberland & Ohio Railroad Company did grading, bridging and tunneling on the five miles, and that afterwards the rails, ties and superstructure generally were put upon the track theretofore graded and the railway was completed by another road at its own expense; and that the county received, and still owns, a stock certificate. The court did not find that the county had ever voted the stock. To the plea that Quinlan was not the owner of the bonds at all the court made finding one in these words:

> "The court finds that the plaintiff is a citizen of the State of New York and was so when this action was instituted, on the 28th day of March, 1899, and that the plaintiff was the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

The finding did not state that Quinlan was the holder before maturity of the bonds, but that he was the holder on March 28, 1899, the date of filing the suit.

It will be shown presently that this finding was intended to be only that when Quinlan brought the suit he held and had paid something for the bonds. It was not, and could not have been, intended to find that he was a *bona fide* purchaser in the sense of the law merchant. He made no such claim in his pleadings.

Quinlan having died after the judgment, his executors, shortly before the expiration of the time limit, sued out a writ of error from the United States Circuit Court of Appeals for the sixth circuit, and, after argument there, the case was certified to this court on the findings of the circuit court. Two questions were propounded. The second read:

> "Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value entitled to assume in his purchase that Green county had before their issuance been fully and completely exonerated from the payment of the capital stock subscribed for by the circuit court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?"

As the question presented to this court a moot case, counsel for Green county moved the Court of Appeals (Record, p. 61) to amend or modify the question in so far as it implied or stated that L. G. Quinlan purchased or obtained the bonds or coupons before their maturity, because the record did not show and it was not a fact that Quinlan was a purchaser before maturity; and in support of the motion the county filed an attested copy of the deposition of Quinlan himself, as read in the circuit court, in which he himself showed that he obtained the papers long after their maturity and for a merely nominal con-

sideration. In his deposition (Record, p. 64 et seq.) he testified that he did not know whether the bonds were for $100.00 or $1,000.00; that his first purchase was on October 7, 1898; he stated that he obtained them through his broker, of Louisville, and "first heard of them at Fisher's Island," when his attention was "called to the price at which the bonds could be bought;" that he was not related to his broker, except that they had married sisters; that he "knew the bonds were in default;" that he held them and "thought something would turn up;" that he had thousands of "just such bonds;" and he showed that he paid one and a half per centum on the face value of some of the bonds, and for others a little more; and his dates of purchase show that he got the bonds, or nearly all, during the month in which the suit was brought.

There was nothing in the deposition or in any evidence in the circuit court to show that Quinlan's assignors paid any more than he did for these papers.

The Court of Appeals denied the motion to modify the certificate (Record, p. 72).

This court answered neither of the two questions as put by the Court of Appeals, but, assuming that the second question meant whether the plaintiff being a *bona fide* purchaser, there was from the fact of issuance any presumption at all of exoneration from the first subscription, answered "Yes." Quinlan v. Green County, 205 U. S., 410. Upon the return of the answer the case was reargued and a decision rendered by the majority of the Court of Appeals reversing the judgment of the circuit court, but, instead of awarding a new trial, directed a judgment against the county on all the bonds and coupons sued on, which included thousands of dollars of coupons

barred by limitation, plea of which was timely made and sustained in the circuit court. (Record, p. 39.)

Thereupon this court granted to the petitioner a writ of *certiorari*.

ARGUMENT.

I.

The judgment of the majority of the Court of Appeals was plainly erroneous in directing (Record, p. 73) "a judgment for the plaintiff for the sum due on the bonds and coupons in suit." The answer (Record, pp. 26 and 27), in paragraphs 7 and 8, pleaded the statutes of limitation of five years, which, under the Kentucky laws, applies to bills of exchange or negotiable instruments, and fifteen years as to ordinary non-negotiable bonds. A demurrer to paragraph 8 (the fifteen-year plea) was overruled (Record, pp. 38 and 39), and the plaintiff did not reply to the plea of limitation. But, nevertheless, the decision of the Court of Appeals disregarded this plea and directed judgment for the bonds and coupons sued on. Judge Lurton's objections, in subdivision 5 (Record, pp. 88 and 89), to this procedure are conclusive on this point; but the mere statement of the facts seems to counsel all the argument that could be required. The respondent's counsel, by suggesting a *remittitur* of the claim for the amount barred by limitation, confess that the judgment was palpably erroneous.

II.

A fundamental error in the opinion of the Court of Appeals was the assumption that the court could consider

only the findings of fact by the circuit court, without reference to other conceded facts or to the pleadings. It is well settled by various decisions of this court that where the case is tried to the circuit court without a jury and then brought up on error, the pleadings can be considered. In Norris v. Jackson, 76 U. S., 9 Wall., at page 128, Mr. Justice Miller said:

> "If the verdict be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings."

Smith v. Sac County, 78 U. S., 139, was a case tried without a jury, with special findings of fact, and Mr. Justice Miller's opinion begins with a statement of the pleadings and the issues therein made.

Independently of authorities, the Appellate Court should, it seems to counsel, always look to the pleadings, as otherwise the court could not know whether the special or general findings of fact were responsive to any of the issues in contest.

III.

The Court of Appeals erred in not considering the deposition of Quinlan:

First, because it showed that the assumption that he was a purchaser before maturity and for a valuable consideration involved the decision of a moot case.

In Singer Manufacturing Co. v. Wright, 141 U. S., 696, Mr. Justice Field said:

> "The taxes being paid, the further prosecution of this suit to enjoin their collection would present

> only a moot question, upon which we have neither the right nor the inclination to express an opinion."

In Mills v. Green, 159 U. S., 651, this court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it;"

and further in the case the court said:

> "And such a fact, when not appearing in the record, may be proved by extrinsic evidence."

Counsel for petitioner does not mean to be understood as claiming that any judgment directed in this case would not be effective; but what is claimed is that the court will not strain a finding of fact to mean what the record does not necessarily imply, and especially against a defendant who has been successful in the lower court, and had no cause for any exception or complaint, and where the judgment of the circuit court in defendant's favor might have properly been based upon the belief alone that the suit was a fraud upon its jurisdiction, as shown by the deposition of the plaintiff himself.

Second, because, as the record shows that there was a timely plea to the jurisdiction on the ground that the suit was brought in violation of the act of 1875, and as the deposition shows, as counsel conceive, that Quinlan did not bring his suit in good faith, and certainly was not a *bona fide* holder, the appellate court having the evidence before it that was offered on this subject in the circuit

court and the judgment of that court, though not in terms passing upon the question of jurisdiction, being entirely consistent with the fact that the suit was not brought in good faith, the Circuit Court of Appeals should not have regarded the question of the violation of the "wholesome" statute (as this court has often characterized it) as immaterial, and reversed the case in such a way as to prevent the circuit court from finding the facts fully and in detail on this question. Had the judgment been for the plaintiff in the circuit court, the defendant could have been required to get the facts in its favor into the record. But as the true facts must be conceded on the hearing, it seems to counsel for the county that they may with propriety be considered.

If the circuit court did not pass upon all the issues and those facts passed upon were not sufficient to sustain the judgment, the circuit court should have been authorized to be at liberty to proceed in all other matters "as, according to its judgment, justice may require." (*Ex parte* Ira G. French, 91 U. S., 1 Otto, 423.)

IV.

Now, apart from the foregoing considerations and disregarding the deposition, the Court of Appeals erred in holding that Quinlan was a *bona fide* purchaser in the sense of the commercial law. Cyc., vol. 7, page 924, says:

> "A *bona fide* holder for value of negotiable paper is one who has acquired title in the usual course of business, for a valuable consideration, in good faith, from one capable of transferring it or from one in possession of the paper with an apparent right to transfer it, and without notice or knowl-

> edge of defenses or circumstances which should put him on inquiry;"

and at page 925:

> "To constitute a person a holder in due course, he must, as a rule, have acquired the same before maturity; otherwise he takes it subject to every equity which existed between the original parties at the time of its transfer."

In a note on the same page, authorities, English and American, on the meaning of the phrase "in the usual course of business" are cited, and among these, Roberts v. Hall, 37 Conn., 205, where it was said:

> "A more definite idea of its meaning may be had, however, by stating the question more specifically. Is negotiable paper ordinarily used in the way and manner in which this was used? Would a business man of ordinary intelligence and capacity receive commercial paper, when offered for the purposes for which this was transferred, as money, and upon its credit part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction."

In Lytle v. Town of Lansing, 147 U. S., at page 68, this court, through Mr. Justice Brown, said:

> "In view of the fact that a prior suit was brought upon coupons of these bonds, which was unsuccessful, and that an effort has undoubtedly been made by some one who is or was interested in them to get them into the hands of a bona fide pur-

chaser, it is natural that their alleged ownership should be looked upon with some suspicion, and the circumstances under which they came into the hands of the present holder should be critically examined, and all the testimony upon the subject of his *bona fides* carefully scanned. It is certainly an unusual proceeding for a stock farmer to trade the bulk of his property for bonds about which he knows nothing and which he does not take the trouble to look at, upon the bare assurance of his vendor that they are good, though such vendor be his own banker, with whom he had been on intimate terms for years."

The opinion concludes:

"Upon the whole, it is impossible to avoid the conclusion that the purchases of these bonds by Brackenridge and Lytle were never made in good faith, but were merely fictitious, and their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfer to get them into the hands of some one who can pose before the court as a *bona fide* purchaser."

This Lansing case seems to decide that, although the value given was the bulk of Lytle's property, the fact that the bonds had previously been the subject of a fraudulent suit showed that he was not a purchaser in good faith in the meaning of the commercial law.

Quinlan's was the third suit by the same attorney upon the bonds and coupons herein involved, as shown by the filing marks on the bonds themselves and by the pleaded records in the circuit court, which that court judicially knew. A court will take judicial notice of its own records. Aspen Min. & Smelting Co. v. Billings, 150 U. S.,

31. The Lansing case is pertinent here in another view. At page 66 the court, considering his *bona fides,* said, as to one of the purchasers, who had paid fifty per centum for the bonds:

> "If the bonds were valid at all, he must have known they were worth very nearly, if not quite, their face value, and the very fact that bonds to this large amount were offered for sale at this large discount, at a place [New York] two thousand miles from where they were issued, was of itself a circumstance calculated to arouse suspicion of their validity in the mind of any person of ordinary intelligence."

The majority opinion of the Court of Appeals in one view apparently took notice of the facts that Quinlan obtained the bonds after maturity, and for a nominal consideration, and necessarily knowing they had previously been in suit, but seems to rest on the presumption that Quinlan's assignors were holders in good faith; for the opinion (Record, p. 83) states that

> "The holder of negotiable paper is entitled to the benefit of the presumptive *prima facie,* that he or some previous holder whose title he has, acquired it in good faith and for value before maturity in the usual course of business and without notice of any circumstances impeaching its validity, and that he is the owner thereof, if it is payable to bearer. Nothing is here shown to contravene these presumptions."

It is true unquestionably, as a general proposition, that the holder of commercial paper is presumed to be its owner, and that when he sues upon it he need state only that

he is the holder and set forth the promise; and the defendant will ordinarily have to show the contrary. But the burden easily shifts. If there is any proof of fraud or illegality which can be left to the jury, such proof will cast on the plaintiff the onus of showing that he or the person under whom he claims is a purchaser in good faith. (Smith v. Sac County, 78 U. S., 139.)

So in Combs v. Hodge, 62 U. S., 21 Howard, at 405, Mr. Justice Campbell said:

> "In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule."

Especially in a case like that before the court does this last rule apply. To quote the Lansing case again, 147 U. S., at page —:

> "As the bonds in this case, though good upon their face, were undoubtedly void as between the railroad company and the town of Lansing, it is incumbent upon the defendant Lytle to show that he, or some one through whom he obtained title to them, was a *bona fide* purchaser for a valuable consideration."

The Cumberland & Ohio R. R. Co. must have sued on these bonds in a Kentucky court, and the Kentucky courts held these bonds void. Certainly the Cumberland & Ohio Railroad Company could not have recovered on these bonds. It was not claimed in the Court of Appeals, and can not be claimed here, for Quinlan that there was ever offered

in the circuit court any evidence whatever that his assignors, who were citizens of Kentucky, were *bona fide* holders in the commercial meaning of those words. There was and could have been no finding to that effect. Then why presume it? When a common law case is brought to the appellate court on a writ of error, the presumption ought to be that the lower court's judgment is correct, and it is for the plaintiff in error to show the contrary.

The records show that Quinlan obtained the bonds and all the coupons after maturity because they were twice before sued on. It is not to be inferred that suit upon the bonds would be brought before their maturity. The court did not find that Quinlan obtained the bonds before maturity. It is undeniably true that he did not. Chief Justice Shaw, in Fisher v. Leland, 4 Cush., 456, said:

> "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation? Why is it not paid? Here is something wrong."

Green County contends that there can be no such thing as a holder in good faith of a municipal bond not containing any recitals who purchases it for a merely nominal consideration when the bonds have twice before been fraudulently sued upon, and which bonds contain marks showing that they had been filed in court. Such a transaction is not in the usual course of any legitimate business.

The fact, also, that the bonds contained no recitals would put even a *bona fide* law-merchant purchaser on notice. Since Knox v. Aspinwall was decided, municipal bonds without any recitals are almost as black swans in the commercial world.

In Crow v. Oxford, 119 U. S., 222, L. Ed., bk. 30, p. 390, Mr. Justice Blatchford, speaking for the whole court, said:

> "Even though the plaintiff purchased the bonds and coupons, as the finding of facts says, 'before their maturity for value, without actual notice of any defense to them, or any defect or infirmity in the proceedings for issuing them,' he was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds."

Hainer, Municipal Securities, sec. 413, states as follows:

> "Where bonds purporting to have been issued by a municipality contain no recitals of an election or of proceedings and orders of the municipality, but are mere naked promises to pay every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records."

V.

The Court of Appeals erred in holding that when the bonds were issued there had been an exoneration, full and complete, from the subscription to the Elizabethtown & Tennessee Railroad, and in effect holding that there had never been, upon the part of Green county, any liability to that company. The pleadings in this Quinlan case conceded that there had been a subscription, and the circuit court found that there had been no exoneration at the time the bonds were issued. Counsel on the

other side, however, advanced in the Court of Appeals two theories. One was that the order in relation to the subscription was void because it delegated to the clerk of the county court the duty of making the subscription, and Mercer County v. Kentucky River Navigation Company, 8 Bush, 300, was flourished as a conclusive authority in support of the theory. They urged that after the decision of that case the county judge saw a great light and discovered that the direction to the clerk was void, and the point was mentioned in the statement of the Quinlan case by this court. The Court of Appeals of Kentucky, in Green County v. Shortell, 116 Ky., disposed of the question by saying that the facts in the Mercer and Green county cases were entirely different, and that it was a proper and usual thing for a court to direct its officers to perform ministerial duties. But, as has already been shown, the law itself or charter of the railroad prescribed precisely that the clerk should perform this particular duty, and there is in the record his statement that there was a subscription.

The second theory presented was that the phrase "being sufficiently advised" occurred in one of the orders (it was the one before this court at the former hearing) mentioned in the findings of fact (Record, p. 47); and it was stated that the phrase showed that the county judge had decided that the exoneration was complete, and only after this decision did he issue bonds.

The ground on which he was assumed to have made this decision was the Mercer county (Bush) case. It is impossible, in view of the charter, to make that claim. But any such argument drawn from the use of the words "sufficiently advised" is also overcome by the simple fact that the first order issuing bonds (Record, p. 37) did not contain

the phrase, and therefore the record shows that the county judge did issue bonds without pretending to have been advised sufficiently or at all. And in none of the orders issuing bonds is there any statement that there had been any exoneration from the former subscription. If the county judge had thought so, it would have been the most natural thing in the world to say so in express and simple words. The answer (Record, p. 32) alleged, and it was not denied, that before delivering said bonds and coupons, "he (the county judge) was warned not to deliver or issue them, but that, nevertheless, he did so," etc. Why should any one warn him not to issue the bonds unless he contemplated issuing them illegally and independently of the condition of exoneration?

An adequate and natural explanation of the motives or reasons which induced the county judge to issue the bonds may be suggested. The county judge was not required by law to be, and as a matter of fact was not, a lawyer. The railroad company was trying to obtain the bonds. The railroad attorneys may have explained to the judge and have claimed that, under the general statutes of the State in force at the time and with which the judge was familiar —this was long before the adoption of the negotiable instruments law by the Kentucky Legislature—a promissory note was not ordinarily a negotiable instrument; that under the terms of the contract and the orders of the court, including the order authorizing the printing of the bonds, they were to be subject to the conditions, and the conditions, or covenants, stipulations, agreements, or whatever or however they may be characterized or called, could be enforced against the county only in the event the railroad complied with the terms of the contract which, under the charter, it must do within a very few years and long be-

fore the bonds could mature; and therefore the road and its assignees would alone assume any risk.

These statutes read:

> "Promissory notes, payable to any person or to a corporation, and payable and negotiable at any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which shall be indorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks in this Commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange." (Ky. Stat., section 474.)

A promissory note payable at a bank in New York could not, under this statute, be made negotiable like a bill of exchange.

> "All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee; but except in case of bills of exchange, not to impair the right to any defense, discount, or offset that the defendant has and might have used against the original obligee or any intermediate assignor, before notice of the assignment." (Ky. Stat., section 474.)

The records of the court gave full notice of the terms of the contract and that they were part of the bonds; and it is not unnatural to suppose that the railroad people enlightened the judge on the law of recitals and showed that in their absence there is no estoppel. It is certain that the value of recitals was known and that the bonds of some of the counties to this road contained recitals.

It is easy to see how the county judge could be persuaded

to issue the bonds without the exoneration, but it is hard to think why the railroad people, having influence enough to obtain the bonds, could not at the same time induce the judge to record or express in direct words the fact of exoneration, if this for any cause were true. If there had been at the time no exoneration of any character, which is our contention, it is easy to see why the county judge, if an honest man, would not, and would not be even called upon to, certify what he knew to be untrue.

The presumption that every official does his duty is not a conclusive one; but the presumption that the county judge did his duty, and therefore there had been an exoneration before the bonds were delivered, is based upon the idea that the court could not delegate the power to the clerk to make the subscription. Is not the clerk entitled to the presumption that he performed his duty? He was an official as well as the judge. He certainly stated that there had been a subscription; this ought to do away with the occasion for any presumption.

The assignment of error was (Record, p. 56) VI:

> "In finding and adjudging that the county of Green had not been *fully and completely exonerated* from the *payment of the capital stock subscribed* on behalf of said county to the Elizabethtown & Tennessee Railroad Company by reason of the facts found to exist in the finding of fact."

There was error assigned only in finding that there had been no exoneration, not in finding that there had been a subscription.

Counsel commends to the attention of the court the very clear reasoning of Judge Lurton in this case (Record, p. 84).

VI.

The Court of Appeals erred in its construction of the contract as a whole and in all its particulars.

It erred in holding that the so-called conditions were merely covenants and that it was in contemplation of the original parties to the contract that the remedy for its breach should be only an action by the county against the railroad for damages. Counsel conceive that this supposition is absolutely untenable when the situation at the time is considered. Everybody knew that by the expressed provisions of the charter the work must be completed within ten years from the date of the approval of the charter or the charter would be forfeited. Everybody knew that the county could not sue for damages until it had paid the bonds, which did not mature until twenty years from April 1, 1871, long after this contemplated defendant, if it did not complete the road, must have ceased to exist.

Laying at one side the matter of exoneration from the first subscription, what was the contract which could be made "with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription?" There were two propositions submitted to the people. The first was "whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company, having twenty years to run and bearing six per cent. interest from date." That was one thing. The second prescribed the terms, time and kind of payment which in the next clause were called conditions, and read, "and *payable in the bonds of said county upon condition that* (1) said

company shall locate and construct said railroad through the said county of Green and (2) within one mile of the town of Greensburg in the said county, and (3) shall expend the amount so subscribed within the limits of Green county," and (4) do all this within ten years from the date of approval of the charter. When the proposition to subscribe and the terms, time and kind of payment had been approved by the voters and the subscription made accordingly, the railroad officials applied for the bonds, and they were authorized to print the bonds, "the same to be conditioned as specified in the order submitting the vote of the said county." That the so-called conditions were to be printed in the bonds was according to the words of the contract and to the proposition of the railroad officials themselves. This was the natural, the only, and the contemporaneous construction of the agreement. If the conditions were not conditions, they were neither precedent nor subsequent; but the things called conditions were not mere idle words. Neither the railroad people nor the voters could have supposed that the language employed was meaningless. The so-called conditions were to be set forth in the bonds, and any one suing on the contract must have alleged and proved a performance of the obligations.

Mr. Justice Gray, in Hopper v. Town of Covington, 118 U. S., 148, said:

> "The bonds in suit, containing no statement of the purpose for which they were issued and no recital which can bind the town by way of estoppel, any one suing upon the bonds is bound to allege and prove the authority of the town to issue them,"

and, later, in the same opinion, he said:

> "When the law confers no authority to issue the bonds in question, the mere fact of their issue can not bind the town to pay them, even to a purchaser before maturity and for value."

Even had there been some recital, it must have been clear and unambiguous. Mr. Justice Harlan, in School District v. Stone, 106 U. S., at p. 187, speaking of recitals, said:

> "We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. When the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law."

This court, in Quinlan v. Green County, did not consider any but the second question. Mr. Justice Moody expressly said:

> "We confine our consideration to that question and the facts relevant to it."

The court did hold that there were no recitals in these bonds, and stated that the road did not run "through" the county, and that the proceeds of $150,000 of bonds only had been spent in the county; and on the facts then before the court held that there was a presumption, though not a conclusive one, that at the time of the issuance of the bonds there had been an exoneration from the first subscription. This court did not pass upon the effect of disregarding the other so-called conditions. Mr. Justice Moody said:

> "This particular condition," the exoneration from the first subscription, "is a condition precedent to the lawful issue of the bonds, although it must not be understood that this statement applies to the other so-called conditions expressed in the vote. *Of them nothing is intended to be said.*" (Our italics.)

He also said that "the law gave to the county the right to impose conditions." The people of the county had also, under the terms of the charter, the power to prescribe such time of payment, terms of payment and kind of payment as they saw fit. This was a Kentucky statute and a Kentucky contract; and while a decision of the highest court of the State may not be binding here, this court will "lean to" such a decision. The kind of payment voted for was a liability contingent upon the railroad company complying with certain provisions or stipulations which should be set forth in the bonds themselves, and which were spread upon the records of the county court.

If the claim be made that the county should pay the proceeds of the bonds that were expended in the county, this is not a suit on that ground for any proportional part of the bonds or coupons, nor is it a suit in equity. The contract was an entirety; and the expenditure of any moneys in Green county by the Cumberland & Ohio Railroad was of no benefit to the county. That road abandoned the little work that had been done, and the Louisville & Nashville Railroad Company, at its own expense, constructed practically a new railway over the short spur running from Lebanon to Greensburg.

Quinlan alleged in the reply that the railroad company

had complied with the terms of the contract. The circuit court found as fact to the contrary.

The suggestion of our adversaries that judgment should go against the county on the theory that the bonds were issued, because necessary to be sold in order to build the road in the county, is without force and is made without due reflection. If the bonds were expected to be sold, then there was to be the sale of a mere contingent obligation. It could not have been necessary to sell them in order to build the road, for the road was never built. It could not have been necessary to sell them in order to expend "the amount of the subscription" in Green county, for that was never done. It has been argued that a bond payable on the performance of things not certain could never have been contemplated, as such a bond would inevitably be sold at a large discount. This is really not an argument. The question is, What was the contract? Moreover, is it shown or claimed that, according to the evidence in the circuit court, the bonds were not sold or delivered originally to contractors or others at less than their face value? Why should the bond of a county that never made default in any promise authorized by the people be sold or delivered to contractors or others at the time it was issued or afterwards for less than par? If it be true that these papers sold for less than par, it goes to show that those who obtained them knew that the liability of the county was absolutely contingent.

It is an unnatural construction of the contract to hold that it was or could be fulfilled by spending "the proceeds of the bonds" in the county, for the face of the bonds and coupons totalled $550,000. The proceeds may have been not more than $40,000, or may have been less. But it is not shown that even the proceeds of the bonds, and par-

ticularly of Quinlan's bonds, were expended in the county. The terms of payment were not that the proceeds, but "the amount of the subscription," should be so expended. That was what was said.

VII.

The case of Green County v. Shortell, 116 Ky., 108, involved bonds of the same issue as those herein. The decision was carefully made, was the unanimous opinion of the court and was decided in accordance with the principles repeatedly announced by this court. The highest court of Kentucky has almost uniformly upheld municipal bonds. There are two exceptions. In the case of Daviess County Court v. Howard, 13 Bush, 101, an issue in excess of the amount authorized by law was held void. This court, in considering the same bonds, reached the same conclusion in another case (Daviess County v. Dickinson, 117 U. S., 657). Mr. Justice Gray delivered the unanimous opinion of the court. The bonds on their face contained no recitals, but there was a certificate on the back of the bonds by the county judge that they were legally issued. This was held not to constitute an estoppel. The other case in which the Kentucky Court of Appeals held bonds void or unenforceable is Green County v. Shortell, 116 Ky., wherein, at page 126, the court said:

> "When the bonds of Green county were offered upon the market, every person buying them was put upon notice that the counties of this State had no authority to issue bonds of this character by the general laws of the State, and that the bonds in question were not binding on the county unless issued by special legislative authority. It was, therefore, incumbent upon all before buying these bonds to

learn by what authority they were issued. It was shown by the bonds that they were issued 'for the Cumberland & Ohio Railroad.' They were made payable to the holder. When the purchaser looked to the charter of the Cumberland & Ohio Railroad, he was informed by it that the county court could only issue the bonds of the county after the question of making the subscription had been submitted to the qualified voters and a majority of them had voted in favor of the subscription. He was also informed that the county might make a subscription on such conditions as it saw fit. There being nothing on the face of the bonds to advise him on these matters, it was incumbent on him, before buying paper which was invalid in the absence of express authority in the officials, to look to the record and see under what circumstances these bonds had come into existence. When he looked to the record of the Green County Court, which, under the act, he was bound to know would set forth the facts, he was apprised that the subscription was made upon the conditions that the company would locate and construct its railroad through Green county, and within one mile of the town of Greensburg, and would expend the amount so subscribed within the limits of Green county, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it was fully exonerated from the subscription to the Elizabethtown & Tennessee Railroad Company. He was also notified that in the order of the court under which the vote was taken it was expressly submitted whether the county would subscribe $250,000 to the capital stock of the Cumberland & Ohio Railroad, 'conditioned and to be paid as above stated,' and that in the order making the subscription it was stipulated, 'This subscription is made with the conditions set out in the order of this court ordering

said election and now on record in the office of this county.' He was further notified that, in the order directing the bonds to be printed, it was provided, 'the same to be conditioned as specified in the order submitting the vote of the said county.' These orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. They plainly disclosed the fact not only that the subscription was conditional, but that it was 'to be paid as above stated,' and that the bonds were 'to be conditioned as specified in the order submitting the vote.' The county officials had no authority to issue a bond not conditioned as specified in the order submitting the vote, for the subscription was expressly conditioned, and only to be paid on condition. If the county officials had followed the order of the county court and issued bonds conditioned as specified in the order submitting the vote, the bonds, on their face, would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon inquiry as to their authority, and their want of authority is as available against him as the facts pleaded would have been, had they followed their authority and conditioned the bonds as specified in the order submitting the vote."

VII.

Ratification of the act of the officials must be by a vote of the people. This was decided by the Court of Appeals of Kentucky in 1877, before either Quinlan or the plaintiffs in the Thomas case got any of the bonds in these cases.

In Daviess County Court v. Howard, 13 Bush, at p. 110, the court said:

> "The voters of the county had no right to assume the burden except in the manner provided by the act. They could not ratify an act that neither the county court or themselves had the power to perform. If the principal could not exercise the right, it is difficult to perceive how his sanctioning its exercise by an agent could make it legal. In making the over-issue the county court or its committee acted beyond the scope of its agency and outside of the power given by the Legislature. The only way in which the people could ratify it would be by a vote under a legislative enactment."

So, in our case the action of the county judge in issuing a bond not containing the stipulations or covenants, or whatever they may be called, prescribed by the voters and in the orders, could only be ratified by a vote of the people under an act of the Legislature. The same doctrine is announced by this court through Mr. Justice Shiras, in Graves v. Saline County, 161 U. S.:

> "But where the municipality is empowered to subscribe with or without conditions, as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, *provided, of course* (our italics)), such waiver is by the municipality, acting as the principal, and not by mere agents or official persons."

VIII.

Green county never was a stockholder in the Cumberland & Ohio Railroad Company. It was stated by the

Court of Appeals of Kentucky in McMillan v. Maysville & Lexington R. R. Co., 15 B. Monroe (1854):

> "The subscribers were not stockholders until the company had performed the condition upon which the undertaking depended, and when that was done, they became stockholders by force of the agreement of the parties."

Thompson on Corporations, section 1335, vol. 2, says the subscription becomes absolute when the condition is performed.

> "Assuming again that the condition is valid under the rules and theories already discussed, it is to be added that it becomes absolute and binding upon the subscriber whenever it is performed by the corporation."

In Henderson & Nashville R. R. v. Leavell, 16 B. Monroe, 359, it was decided that

> "conditional subscriptions to a railroad, not inconsistent with the terms of the charter, are binding if the conditions are performed."

In Taggart v. Western Maryland R. R. Co., 24 Md., 563, 89 Am. Dec., 760, it is said that

> "all contracts for stock made subsequent to the formation of an incorporated company, in consideration of a particular location, as of a railroad track, will, when complied with by the company be as binding on both parties as if the contract had been absolute and unconditional."

This seems to have been the reason of the decision by the Supreme Court in Burke v. Smith, 16 Wallace, 390, wherein the court remarked:

> "If, then, the reason of the rule invoked by the appellants has no applicability to the facts of this case, the rule itself fails, there is no condition to be stricken from the subscription, and there is no ground for holding the appellees liable beyond the plain letter and spirit of their contract."

So, in Galt's Executor v. Swain, 9 Grattan, 633:

> "On the facts stated in the answers, it must be held that a subscription, like any other promise or offer, may be conditional If particular terms are prescribed, these terms in themselves are conditions which must be complied with before the subscription is binding."

In Jewett v. Lawrenceburg, etc., R. R. Co., 10 Ind., 539, the law was thus expressed:

> "The condition, as proved, was, that the road should be located within twenty rods of the town of St. Omer. In this case the language employed certainly means that when the road was constructed it should be within that distance of the town. The evidence shows that the road is, in fact, constructed one and a half miles distant therefrom. Is this a substantial compliance? In the case of Evansville, etc. v. Shearer, at this term, we have decided that where a subscription is made upon the express condition that the road shall be constructed in a particular place, the subscriber could not be a stockholder; and, consequently, not liable on the agreement until the performance of the conditions upon which the subscription was made, and whether they have been performed is a question of fact."

Any certificate of stock issued to a conditional subscriber should show the contract between the parties, and if, as in our case, the subscriber had no real rights, a certificate to that effect showing the contract would be absolutely valueless, and would be so whether it showed the contract or not, and would be without consideration or assignability for any purpose, and all cases to the effect that the possession or receipt of a stock certificate implies consideration are irrelevant in the case at bar.

The consideration for the county's subscription was by the charter to be the building of the road by the company and its fulfillment of the contract of subscription. The first proviso (Appendix A) in section 15 declared "that the said cities, towns or counties shall receive no dividends on their stock."

IX.

The county judge alone had no power to act on the proposition for a subscription. All the orders and proceedings as the record and findings show were made and had at called terms. The charter did prescribe in a proviso of section 15 as follows:

> "That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all powers herein given to the county court are hereby vested in the presiding judge of the county court."

What application? The word is not mentioned in the charter. If it meant the application or proposition for a subscription, the application was not made to him. The

commissioners "preferred" to address their proposition to the county court: "hereby request the County Court of Green county to submit to a vote," etc.

The Court of Appeals of Kentucky, in Bowling Green and Madisonville R. R. Co. v. Warren County, 10 Bush, 711, decided that,

> "in general, where a reference is made to a county court or the action of a county court, it is understood as a court presided over by the county judge alone. But the justices of the peace are associated with him in laying the county levy, making appropriations, and when the financial interests of the county are involved."

Under this charter the powers given to the county judge may have properly been those mentioned in the proviso in which the words "powers herein" occur; and "a proviso is always to be construed with reference to the immediately preceding parts of the clause to which it is appended, and not to the whole section or act." (Springfield v. Collector, 78 Ill., 101; Exp. Partington, 6 Q. B., 649.) In McGill v. Municipal Council, 12 U. C. Q. B., it was held that the words "*herein* contained" should be applied only to the clause of the statute in which they occurred, that being the more obvious construction.

However this may be, the facts show that those who usually participated with the county judge in the financial management of the affairs of the county were absolutely excluded from the consideration of this proposition which was addressed to them.

X.

This court has never in any case, that counsel has been able to find, decided that the voters of a county could not

authorize the issuance of a bond payable only on a contingency, or on a condition subsequent or subject to a covenant. It is true that in most of the bond cases the principal question has been whether or not some condition precedent to their issuance had been performed. The doctrine of estoppel by recitals has been carried to the greatest extreme. As Mr. Justice Moody remarked of these cases in the Quinlan case opinion, "they have gone far."

A recital by a county official in a municipal bond has been allowed to over-ride the expressed provisions of the Constitution of a State. But, as already shown, Mr. Justice Harlan said in School District v. Stone that this court was unwilling to enlarge or extend the doctrine—"sound policy forbids it."

Since the great dissenting opinion of Mr. Justice Miller, in Humboldt Township v. Long, 92 U. S., 2 Otto, 642, Knox v. Aspinwall, and cases following it have ceased to be authority, except in cases wherein the bonds contain recitals, or, as Mr. Justice Moody puts it in the Quinlan case opinion,

> "but in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided."

The law in respect to recitals has really no place in the discussion of our case. There are no recitals in these bonds. The bare fact that a bond is issued by the official having power to issue bonds does not shut off defenses. This was the opinion of Mr. Justice Bradley in Town of Coleman v. Eaves, 92 U. S., 481:

> "It may be *prima facie* sufficient, but the contrary may be shown."

The general principle running through all the cases is that, in the absence of a recital, there is no estoppel of any kind. (See especially Citizens' Savings Association v. Perry County, 156 U. S., 701; Carroll County v. Smith, 111 U. S., 556; Hopper v. Town of Covington, 118 U. S., 148; Crow v. Oxford, 119 U. S., 222; Marsh v. Fulton County, 10 Wallace, 683; Merchants' Exch. Nat. Bk. v. Bergen County, 115 U. S., 392.)

Undoubtedly, there have been cases decided in this court enforcing municipal bonds which contained no recitals or in which the presence or absence of recitals is not mentioned. But in none of those cases are the facts like those presented in the records of the Quinlan and Thomas cases. For instance, the case of Town of Brooklyn v. Aetna Life Insurance Co., 98 U. S., 9 Otto, 362. In that case Mr. Justice Harlan said:

> "Had the insurance company, before consummating its purchase of the coupons, examined the act incorporating the Chicago & Rock River Railroad Company, it would have ascertained: 1. *That the statute made no provision for conditional subscriptions*," etc.

It is in the consideration of municipal bond cases especially that the words of Mr. Chief Justice Marshall should be recalled. In Cohens v. Virginia, 6 Wheaton, 399, he said:

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is pre-

sented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

XI.

There being no recitals, the case should be decided according to the general principles of the laws of agency. It is thoroughly settled as principles of general commercial law that an agent of a municipal corporation must keep strictly within his powers of attorney at all times, and that the authority of all agents in executing commercial papers will be rigidly construed.

Justice Bradley, in Chisholm v. Montgomery, 2 Woods, 584:

> "Public officers can not acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic can not be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it."

In Mayor and City Council of Baltimore v. Reynolds, 20 Md., 1, the court said:

> "Although a private agent may bind his principal by acts in violation of his special instructions, if they are within the scope of a general authority, the rule is otherwise when applied to the acts of an officer of a public corporation, the reason being that in the former case the extent of the authority is necessarily known only to the principal and his agent, while in the latter it is a matter of record in the books of the corporation or the public laws."

In Snow v. Warner, 10 Met. (Mass.), 136, occurs this language:

> "An agent appointed by a writing which defines and limits his authority, is subject to its terms, and acts done by him not within the scope of the authority can not bind his principal, and a person who trades with such agent must examine for himself whether the agent is acting under written instructions, and the principal will not be bound because such agent is ignorant of their existence. It is his duty to inquire, when by his bargain or sale he expects to bind a third person."

See, also, Reese v. Medlock, 27 Tex., 120.

> "The power to make or endorse negotiable instruments must be expressly granted by the principal. A power so granted is subject to strict interpretation, and must be performed in strict conformity with the terms thereof."
>
> Eaton & Gilbert on Commercial Paper, p. 81.
>
> Also Tiedeman on Commercial Paper, p. 139.

Judge Brewer, in Lewis v. Bourbon County Commissioners, 12 Kan., 216:

> "Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. . . . That these bonds were negotiable paper does not alter the case. The law merchant does not make the act of an agent proof of his authority."

Counsel for Green county ask that the judgment of the Circuit Court of Appeals be reversed, and that the judgment of the circuit court be affirmed.

Respectfully submitted,

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel for Green County.

APPENDIX A.

"An act to incorporate the Cumberland & Ohio Railroad Company," Acts 1869, vol. 1, p. 463:

"Sec. 12. That the president and directors of said company are hereby vested with all the powers and rights necessary to the construction of a railroad from the Ohio river *through* Henry county, Shelby county, Washington county, Nelson county, Marion county, Taylor county, *Green county*, Barren county, and Allen county, to a point on the boundary line between the States of Kentucky and Tennessee, to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with the view of connecting with the Southern system of railways converging at Nashville, Tennessee."

"Sec. 15. That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, payable semi-annually in the city of New York, payable at such times as they may designate not exceeding thirty years from date; but before any such subscription on the part of any

city, town or county shall be valid or binding on the same, the mayor and aldermen or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns, or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription, as hereinbefore directed; and the mayor and aldermen or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the county court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns or counties, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it occurs, together with the cost of collecting the same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this they may establish a sinking fund, and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by

law, or may adopt such other means as to them may seem proper and expedient; and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns or counties, under whose subscription the tax is levied, shall be divested of stock to the extent of stock issued on said tax receipts; and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, a certificate of stock shall be issued for a fractional part of a share: *Provided*, that the said cities, towns or counties *shall receive no dividends on their stock*, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends and to all the rights and privileges as the original and cash stockholders. *And provided further*, that said company may, in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year. *And provided further*, that the company may purchase said bonds and surrender them at any time to the cities, towns or counties issuing them, and have the same cancelled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the county court of any county having jurisdiction, may appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns or counties, within the jurisdiction of same, to collect the said tax, all of whom shall

have the same powers and remedies, and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of the State revenue. The mayor and aldermen, or chairman and board of trustees, shall require and take from the person collecting the tax a bond with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay the State revenue, and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court," etc., etc.

"Sec. 18. They (the Cumberland & Ohio Railroad Company) shall begin work on their road, in good faith, within three years, and complete the same within ten years from the passage of this act, or forfeit the powers and franchises herein conferred."

Section 16 of the charter closes with these words: "And (the Cumberland & Ohio Railroad) shall have all the powers and privileges conferred upon said Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad, not herein specified and granted, and not in conflict with the terms of this charter."

Subsection 6 of section 1 of an "Act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1858 (1 Acts 1855-6, page 181), declares:

"That said railroad company may receive subscriptions of stock to their company by individuals, towns, cities, counties or other corporations, whether payable in money or other things, with such terms, and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription," etc.

APPENDIX B.

Acts of Kentucky, 1878, Vol. 1, page 549, chapter 482: "An act to amend an act, entitled an act to incorporate the Cumberland & Ohio Railroad Company, approved February 24, 1869," became a law March 18, 1878.

"Sec. 6. That the Cumberland & Ohio Railroad Company may be divided into two distinct corporations, with the approval of a majority of the stockholders voting at a regular or called meeting of the company. The one corporation to own the section of railroad situate between Campbellsburg, in Henry county, and Bloomfield, in Nelson county, and to be composed of the stockholders north of Washington county, and to be known by the corporate name of the Northern Division of the Cumberland & Ohio Railroad Company; and the other to own the section of said road situate between Lebanon, in Marion county, and Greensburg, in Green county, and to be known by the corporate name of the Southern Division of the Cumberland & Ohio Railroad Company, and to be composed of the stockholders south of Washington county; and each to have the right to sue and be sued, and the powers conferred by this act upon the Cumberland & Ohio Railroad Company so far as applicable to their respective sections."

"Sec. 10. That if any of the bonds or coupons of bonds of the counties of Allen, Barren or Washington have not

been issued or sold, such bonds or coupons shall not be issued or sold to aid in the construction of the Cumberland & Ohio Railroad; but the same shall be and remain the property of the counties in whose names they were executed, and nothing herein shall be construed to affect the validity or any legal question connected with the bonds of any of the counties along the line of the road."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 351.

GREEN COUNTY, KENTUCKY, - - - - - *Petitioner,*

vs. BRIEF FOR RESPONDENT.

MARY AMIS QUINLAN, EXECUTRIX OF LEONARD G. QUINLAN, DECEASED, - - - - - *Respondent.*

STATEMENT.

Affirmative Statement.

1. This case is before this court on a *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit, granted upon the petition of Green County, defeated litigant in that court.

Respondent's testator, L. G. Quinlan, sued petitioner, Green County, in the United States Circuit Court for the Western District of Kentucky upon certain bonds and coupons issued by Green County. The case was by consent submitted to the judge, without a jury, and upon the special findings of facts by him made both parties demanded judgment. Judgment was given for Green County, and Quinlan prosecuted thereto a writ of error from the Circuit Court of Appeals for the Sixth Circuit.

After argument, oral and by brief, in the Circuit Court of Appeals and submission of the case, that court certified to this court two questions, and this court answered the *second*, declaring the *first* too broad. *Quinlan* v. *Green County, Ky.*, 205 U. S. 410. This *certiorari* brings up the points involved in the *first* question, which this court declined to answer as ineffectually certified.

After the certification of the two questions aforesaid by the Circuit Court of Appeals, Green County, on March 6, 1906, sixteen months after the judgment in the Circuit Court, moved the Circuit Court of Appeals to modify the second question so certified, and upon such motion filed what purported to be a certified copy of a deposition given by Leonard G. Quinlan, respondent's testator, in the Circuit Court on the trial of an issue of fact raised by Green County's plea in abatement, and the Circuit Court of Appeals on the same day, *to-wit*, March 6, 1906, entered an order denying the said motion in words as follows:

> "The motion in this cause to modify or amend certificate of questions certified to the Supreme Court is denied." *Rec.* 61, 72.

The paper filed in the Circuit Court of Appeals on said motion appears on *page 64, et seq.*, of the transcript.

The questions so certified to this court, as aforesaid and the special findings of facts by the Circuit Court constituted the entire record certified to this court by the Circuit Court of Appeals, *and the case was tried in the Circuit Court of Appeals solely upon the pleadings, stipulations and the special findings of fact.*

The facts are so fully stated by this court in its opinion in *205 U. S. 410* that we adopt the statement there made without repeating it in this brief.

Objections to Petitioner's Statement of Facts.

2. Opposing counsels' misconception of the facts of this case has begotten numerous inaccuracies in their statement.

They state (*Brief, p. 6*) that the record (*p. 35*) shows that the railroad company's proposition to Green County to subscribe to its capital stock "was signed by D. T.

Towles, the clerk of the County Court, the identical person and clerk who was directed to make the subscription to the Elizabethtown & Tennessee Railroad," etc. They state, however, that the statement of Towles contained an error, *viz.*, that the capital stock had been "subscribed by the County Court," whereas the County Court could only authorize the subscription; that is, they maintain that the clerk was mistaken when he performed his official duty of entering the court's order, but infallible when he, or some one of the same name, was acting as commissioner of the railroad company.

This is refuted by the record cited (*p. 35*), showing simply that D. T. Towles and B. W. Penick, commissioners of the railroad company, made the proposition. If the D. T. Towles who was commissioner was also clerk, he acted as commissioner, and not as clerk in making the proposition. The proposition (*p. 35*) that the County should be exonerated "from the payment of the capital stock subscribed for by the County Court" meant nothing, except what had actually occurred, *to-wit*, the vote of the County and the entry of the order directing the clerk to subscribe; and, accordingly, the order entered by the court, and written upon the order book by the clerk on the same day (*p. 35*), directs the vote upon terms including the County's exoneration "from the payment of the capital stock voted by said County and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad." Assuming D. T. Towles, commissioner, to be the same individual as D. T. Towles, clerk, his use of the term "subscribed by the County Court" did not signify that he, as clerk, had actually signed at its foot a subscription upon the railroad company's corporate books.

Green County in its answer (*p. 27*) declares how it "subscribed" to the stock of the Elizabethtown & Tennessee Railroad Co., *viz.*, "said County by vote of its people subscribed three thousand shares of $100 each

to the capital stock of the Elizabethtown & Tennessee Railroad Co., and that thereafter, on the 20th day of May, 1868, there was, in pursuance of the vote of the people so subscribing, entered upon the records of the Green County Court the following order and subscription in words and figures as follows," reciting the order of May 20, 1868 (*p. 28*). The Circuit Court, *Finding 17* (*p. 49*), determined "that no formal or express exoneration of said County from the payment of said last-named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the County nor stock by the said last-named railroad company have ever been issued or delivered in the execution of said orders or under the terms of said subscription" but "the said subscription" referred to the next preceding sentence, *to-wit,* "it is now, therefore, ordered that the clerk of this court, for and on behalf of the County of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid," showing that the Circuit Court referred to a "subscription" *authorized* and not to a "subscription" made, but, *e contra,* he found "nothing further has up to this date ever been done in respect to it"; that is, "the subscription authorized." The clerk, therefore, did not subscribe to the railroad company's books, nor the company accept the proposition.

The Circuit Court of Appeals (*p. 79*) recites that the subscription "was voted and the County Court ordered its clerk to subscribe for the stock. But that was all. The clerk did not subscribe. No bonds were ever issued and no stock was ever delivered or tendered to the County."

The dissenting judge quotes *Finding 17* of the Circuit Court as showing the existence of a "subscription," evidently overlooking the fact that it referred to the "subscription" mentioned in the next preceding sentence, which was not a subscription made, but a subscription authorized, or authority to subscribe.

The term "subscription" is carelessly used in the pleadings, both of Green County and of Quinlan, but the pleadings of both show what was meant by the term, *viz.*, "the subscription authorized;" thus Green County (*p. 33*) in its answer alleges "that this defendant was never exonerated completely or at all from the payment of the capital stock voted by said County and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest therein;" and Quinlan alleges in his reply (*p. 39*) "plaintiff denies that the defendant was never exonerated from the payment of the capital stock voted by said County and authorized to be subscribed by said County to the Elizabethtown & Tennessee Railroad, and plaintiff says that defendant, Green County, was fully and completely exonerated from the payment of its subscription to the capital stock of the Elizabethtown & Tennessee Railroad Co., etc.

The term "subscription," when thus carelessly used, always referred to what was understood, and in solemn acts, like the order of the County Court directing the vote of the County to be taken, was accurately recited.

Our opponents' inaccuracy in the particular just indicated occurs frequently in their argument, *e. g.*, reciting that Quinlan had conceded in his pleadings that a subscription had been made (*p. 24*), etc.

On page 8 of their brief counsel state that the bonds sued on "were *each* endorsed as follows: 'Filed Oct. 1, 1894; Thos. Speed, clerk. Filed Aug. 30, 1895; Thos. Speed, clerk. Filed March 28, 1899; Thos. Speed, clerk.' " (*italics ours*), and refer to the record (*p. 15*) as showing that the identical bonds and coupons had twice before been sued on in the same Circuit Court. Of course, such a file mark, even if it existed on all the bonds, does not show that fact or render it unquestionable, as counsel contend, and if it did show it, the fact would be immaterial. And further, the record shows this endorsement

was only upon the one-hundred and the five-hundred-dollar bonds, and shows that no such endorsement was on the thousand-dollar bonds (*Rec. p. 19*), nor any endorsement, except the one filing them in this particular suit.

In the same connection counsel state with emphasis (*Brief, pp. 8-9*) that Quinlan "did not in his petition claim that he was a *bona fide* purchaser before maturity for a valuable consideration and without notice" of the bonds sued on. Of course, all that was necessary to be averred was what Quinlan averred, *viz.*, that he was the holder and owner of the bonds described. This opposing counsel concede (*Brief, pp. 21, 22*).

For what purpose it is impossible to detect, counsel, on pages 10 and 11, recite certain irrelevant matter, which was stricken from the plea in abatement by the Circuit Court, and to which action of that court counsel *took no exception.*

Counsel recite (*p. 12*) "the court found that none of the conditions of the contract had been fulfilled." This is refuted by *Findings 8, 10, 11 and 12.*

As to counsels' contention that the Circuit Court did not mean what it said in *Finding No. 1,* and that the Circuit Court of Appeals certified and this court answered only a moot question in the case reported in *205 U. S. 410,* we shall speak in the argument to follow. We need only now note that the contention is based upon a paper lodged, but no part of the record (*p. 61*), and counsels' own testimony given for the first time in this brief (*pp. 14, 22, 23*) *dehors* the record, but carrying its own improbability upon its face as contrary to all presumptions from the facts found and refuted by the express findings of the Circuit Court.

ARGUMENT.

I.

Our opponents' methods of discussion embarrass us exceedingly by presenting the alternative of discussing matters outside the record, and based even upon their unsupported assertions or appearing by silence to concede the facts so improperly asserted. As aforesaid, the Circuit Court by consent, without a jury, heard the evidence and made special findings of the facts, *and both Quinlan and Green County moved for a judgment upon those findings.* No case could be presented in a more succinct and orderly way. It was open to either litigant to except to any finding of fact, and if the court adhered thereto to complain of its action upon a writ of error and a bill of exceptions containing *all* the evidence upon the point involved. Nevertheless, both parties demanded judgment upon the findings made by the Circuit Court, *and Green County obtained the court's judgment in its favor.* (*Rec. 44, 49.*)

There is no uncertainty as to what the judgment of the court was based upon; it was in Quinlan's favor upon the plea in abatement, as appears by *Finding No. 1,* and in Green County's favor upon the points indicated under "conclusions of law," *p. 49.* The latter points are thus stated (*p. 49*):

> "Upon consideration of the facts hereinbefore found to be true and of the opinion of the Court of Appeals, in the case of J. D. Shortell v. Green County, the court, in deference to said opinion, has reached the following *conclusions of law:*
>
> "1. That the plaintiff is not entitled to recover, because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Rail-

road Company was made and upon which the bonds sued on were issued have not been performed or complied with, and

"2. That the failure to recite in the bonds any of the facts found herein to be true or any of the conditions upon which the bonds were issued is immaterial as against the defense that there was a failure to perform the said conditions."

Notwithstanding these unmistakable grounds of the Circuit Court's decision, so specified and elaborated, not only distinctly deciding the question of jurisdiction, but enumerating the grounds upon which the court dismissed Quinlan's petition upon the merits, counsel actually contend seriously (*pp. 17 and 18*) that the Circuit Court may have based its judgment dismissing the petition upon the ground that Quinlan did not bring his suit in good faith and was not a *bona-fide* holder of the bonds sued on so as to confer jurisdiction upon a Federal court, and that the Circuit Court's judgment did not in terms pass upon the question of jurisdiction, and is entirely consistent with the fact that the suit was not brought in good faith. Consistently with such a contention counsel assert that the Circuit Court of Appeals ought to have reversed the finding of fact made by the Circuit Court upon which its decision in favor of Federal jurisdiction was based when no exception was taken by Green County to the court's finding of fact, and no evidence was before the Circuit Court of Appeals on the subject.

Without committing an offense similar to that of our opponents it suffices to say that their statement, *p. 14*, that "there was nothing in the deposition or in any evidence in the Circuit Court to show that Quinlan's assignors paid any more than he did for these papers," and on *page 22* "it was not claimed in the Court of Appeals, and can not be claimed here, for Quinlan, that there was ever offered in the Circuit Court any evidence what-

ever that his assignors, who were citizens of Kentucky, were *bona fide* holders in the commercial meaning of those words," is effectually disproved by facts appearing in the record and the logical deductions from them, for the single deposition which counsel improperly singled out from the mass of testimony presumably, and tendered a copy of to the Circuit Court of Appeals to be read upon a motion, which was denied by that court, leaves the conviction that the Circuit Court, in making its finding that Quinlan was a *bona fide* purchaser for value and the other findings, *Nos. 8, 9, 10, 11 and 12,* must have had before it evidence such as this court would naturally expect to be given, to the effect that the bonds issued by Green County and delivered to the railroad company in 1871 and 1872 for the purpose of the company's raising money to construct the railroad in question were sold in the open market or delivered to contractors or materialmen in payment for labor or materials at the current market price of such bonds, within two or three years after the delivery of such bonds to the railroad company and consequently fifteen or seventeen years before the maturity of the bonds, and when the purchaser thereof could have had no notice whatever of the failure which the railroad company would make to comply with its covenants to extend the railroad through the county, and within a mile of Greensburg, and to expend the amount subscribed within the limits of the county; and Quinlan was even able to show, as late as October, 1904, as expressly found by the Circuit Court (*No. 11*), that $150,000 of the bonds, or their proceeds, were actually expended within this particular county.

The finding aforesaid by the Circuit Court that Quinlan was a *bona fide* holder for value is sustained, whether the plaintiff be himself such a purchaser or "the successor of one who was," *McClure* v. *Oxford,* 94 U. S. 432; and the presumption is, where the contrary is not shown,

that the holder of negotiable bonds is a *bona-fide* holder for value before maturity and without notice, especially when payable to bearer. *New Orleans, etc., Co.* v. *Montgomery, 95 U. S. 16, 18, etc.*, and other cases cited hereinafter.

It, accordingly, results, as determined by the Circuit Court of Appeals that *Finding No. 1* of the Circuit Court is sustained, whether Quinlan be himself a purchaser for value before maturity and without notice or the successor of one who was. Had the Circuit Court failed to find, as it did find, that Quinlan was a *bona fide* holder for value, it must have found that his predecessors in ownership took the bonds from the railroad company, or its vendees, for value when it was realizing upon them the funds necessary to construct the road, but the equivalent of such finding is included in the finding actually made by the court, and with more brevity and conciseness.

II.

The decision of the Court of Appeals of Kentucky as to the validity of the Green County bonds is not controlling upon this court. This court forms its own independent judgment in such cases.

Burgess v. Seligman, 107 U. S. 20; 27 L. Ed. 359.
Folsom v. Township, 159 U. S. 611; 40 L. Ed. 278.
Stanley Co. v. Coler, 190 U. S. 437; 47 L. Ed. 1126.
Great Southern, etc., Hotel Co. v. Jones, 193 U. S. 532; 48 L. Ed. 778.
Murray v. Wilson Distilling Co., U. S. C. C. A. 164 Fed. 1, 24.

Of course, had the decision of the Kentucky court been made before the issuance of the bonds the case might have been different. But it is utterly inadmissible for

a State court to destroy rights already vested by making any particular decision upon a question of commercial law involved in a case. This principle has especial application here, because in the case relied upon by petitioner, *viz., Shortell* v. *Green County, 116 Ky. 108,* the Kentucky court first held Green County's answer demurrable, *22 K. L. R. 1010; 59 S. W. 522,* and on petition for a rehearing likewise so held in *23 K. L. R. 144; 63 S. W. 979,* and remanded the case for further proceedings, and subsequently, in *116 Ky. 108,* held the bonds void. Petitioner's contention would invalidate even the bonds of bondholders who purchased after the State court held the County's answer insufficient. How little may generally be realized from County bonds in Kentucky may be gleaned from reported decisions, *e. g., Campbellsville Lumber Co.* v. *Hubbert, 122 Fed. 718; 59 C. C. A. 435.*

III.

Green County's contention that the Circuit Court meant its first finding of fact (*p. 44*) to indicate nothing as to the character, or *bona fides,* of Quinlan's holding of the bonds and coupons sued on is sufficiently answered by the Circuit Court of Appeals (*p. 83*), saying:

> "But this court in its question to the Supreme Court construed this finding to be also a finding that the plaintiff was a *bona-fide* holder for value, and the Supreme Court certainly so construed it, as is shown in the statement of facts, and we have no doubt correctly. That part of the finding of facts had no relevancy to the question of jurisdiction. If she was a citizen of New York and was the holder of the bonds, she was entitled to sue. The question of whether she was a *bona-fide* holder for value was a question upon the merits of the case. The phrase

> which the court below employed was one peculiar to the law of negotiable instruments and ought to be construed in the sense in which it is there employed. But it really is not material. If, as we hold, the bonds were lawfully issued, the presumption of law would clothe the plaintiff, if she was the holder, with the character of a *bona-fide holder* for value."

In accordance with their contention counsel argue (*Brief, p. 13*) that the question answered by this court in *205 U. S. 410* was a moot question, because, as they contend, Quinlan was shown by his deposition in the Circuit Court, *of which counsel offered the Circuit Court of Appeals a copy on Green County's motion to amend the second question certified by that court to this court,* to have purchased the bonds after maturity, and that, therefore, the question certified to this court, and answered by this court, was irrelevant and a moot question. This contention is obviously without merit, for the question certified was not only based upon the Circuit Court's findings of fact, but, as said by the Circuit Court of Appeals in the quotation just made, both that court and this court, *having before them, respectively, the findings of facts made by the Circuit Court,* construed the findings as indicated in the question certified.

Moreover, Green County *had a trial of the question now made,* on its motion, when it made its motion (*p. 61*), to amend the question certified. The Circuit Court of Appeals saw its certified copy of the deposition, and denied its motion to amend the question certified.

Likewise, this court had before it, as did the Circuit Court of Appeals, not only the questions certified, but the *findings of fact and of law* made by the Circuit Court, and, as said by the Circuit Court of Appeals in the quotation just made (*p. 83*), both courts construed the finding of the Circuit Court as the Circuit Court of Appeals has done in the judgment now under review.

Again, if the matter were not concluded as just indicated, the result would be the same, because, whether Quinlan purchased before or after maturity, paid large or small value for his bonds, had notice or not of everything affecting them, he was nevertheless such *bona fide* holder if he obtained the title of such *bona fide* holders for value, without notice and before maturity, as held by this court in *McClure* v. *Oxford*, 94 U. S. 432, 24 L. Ed. 129; and such prior holders of bonds are presumed to have been such *bona fide* holders; *New Orleans, etc., Co.* v. *Montgomery*, 95 U. S. 16, 18, *etc.*

In *McClure* v. *Oxford* this court said:

> "To be a *bona fide* holder, one must be himself a purchaser for value without notice or the successor of one who was;"

and in *New Orleans, etc., Co.* v. *Montgomery* this court held that holders of negotiable bonds payable to bearer are presumed to be *bona fide* holders for value, without notice and purchasing before maturity.

The judgment, therefore, of the Circuit Court of Appeals, now under review, *p. 83*, is correct, whether Quinlan individually occupied the attitude found by the Circuit Court in its first finding of fact or took the title of those who did. If, therefore, counsel had in any legitimate way established that Quinlan himself purchased after maturity, a fact not shown by anything in the record, the findings of fact made by the Circuit Court would still be upheld by the presumptions declared by this court in *McClure* v. *Oxford, and New Orleans, etc., Co.* v. *Montgomery* just cited. The findings by the Circuit Court are *not only presumed correct*, and are unimpeachable by anything *dehors* the record, much less by bare assertions of counsel in briefs, but by the circumstances naturally presumed to attend such transactions as that between the County and the railroad com-

pany, *viz.*, the high probability, next to certainty, that the railroad company would promptly dispose of the bonds either for labor and material or for money to purchase them, and it appears in Green County's *petition for certiorari* in *case No.* 352, heard with this case, as above shown, that the bonds sued on in that case were received by the Indianapolis Rolling Mill from the railroad company for railroad iron (*Pet.* 7) and we were able to show as late as October, 1904, at the trial of this case, that all the bonds had been delivered to the railroad company, and that as much as $150,000 of them had been disposed of in work *actually done in this particular county.* (*Findings* 8 *to* 12, *p.* 47.) The question certified was, consequently, not a moot question, but a most pertinent question, and this court's answer to it is *conclusive on the points covered by it.*

Nor is there any merit in counsel's complaint of surprise, (*Brief, p.* 18) that the judgment in Green County's favor being reversed, judgment was rendered in Quinlan's favor. This principle has been settled by this court at least since its decision in *Fort Scott* v. *Hickman,* 112 U. S. 150, and by that decision and others it is established, *pp.* 164, 165, that the Circuit Court's "special finding of facts is, under Section 649 of the Revised Statutes, equivalent to the special verdict of a jury, *Norris* v. *Jackson,* 9 Wall. 125; *Copelin* v. *Insurance Co.,* 9 Wall. 461, 467; *Insurance Co.* v. *Folsom,* 18 Wall. 237, 249; *Retzer* v. *Wood,* 109 U. S. 185; and, as such special finding covers all the issues raised by the pleadings, this court has the power, under Section 701 of the Revised Statutes, to direct such judgment to be entered as the special finding requires. In cases like the present one, the proper practice is to direct a judgment for the defendant, instead of awarding a new trial. *National Bank* v. *Insurance Co.,* 95 U. S. 673, 679; *Fairfield* v. *County of Gallatin,* 100 U. S. 47; *Wright* v. *Blakslee,* 101 U. S. 174; *People's Bank* v. *National Bank,* 101 U. S. 181; *Warnock* v. *Davis,*

104 U. S. 775; *Lincoln* v. *French*, 105 U. S. 614; *Ottawa* v. *Carey*, 108 U. S. 110; *Kirkbride* v. *Lafayette Co.*, 108 U. S. 208; *Retzer* v. *Wood*, 109 U. S. 185; *Canada Southern Railroad Co.* v. *Gebhard*, 109 U. S. 527; *East St. Louis* v. *Zebley*, 110 U. S. 321. The trial being without error, if the finding is sufficient, the same judgment is to be given as would be given on a special verdict. Where the special finding embraces only a part of the issues, as in *ex parte French*, 91 U. S. 423, a different rule prevails."

This rule has been, of course, constantly adhered to. In *Allen* v. *St. Louis Bank*, 120 U. S. 20, 40, this court said:

> "All the facts of the case being ascertained by the special finding of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants. *Fort Scott* v. *Hickman*, 112 U. S. 150."

Likewise in *Stanley* v. *Schwalby*, 162 U. S. 255, 282, this court said that the practice in Texas was like that in this court "and as this court does upon a finding of facts by the Circuit Court of the United States in cases tried by the court upon a jury being duly waived, render such judgment as should have been rendered by the court below," citing *Fort Scott* v. *Hickman*, *supra*, and other cases.

As late as *Meyer* v. *Richards*, 163 U. S. 385, 415, this court said:

> "The views above stated are controlling and decisive of the case and lead necessarily to the reversal of the judgment. As the case was heard upon a stipulation waiving a jury and upon an agreed statement of facts, it is our duty, in reversing, to direct

that the proper judgment be entered below. *Fort Scott* v. *Hickman*, 112 U. S. 150, and cases there cited."

Counsel were, therefore, bound to know that upon a reversal of the Circuit Court's judgment in its favor the mandate of the Circuit Court of Appeals would direct judgment in Quinlan's favor because the findings of fact covered the entire case, and it was consequently *incumbent upon Green County*, if the finding in question was by it considered contrary to the evidence, *to except to the finding and to take to the Appellate Court a bill of exceptions containing all the evidence pertinent to the exception.* Instead of so doing *Green County demanded, and obtained judgment in its favor upon the findings of fact made by the Circuit Court*, and now insists upon retrying upon the evidence the questions concluded by those findings. To state the point is to refute it. If such practice were tolerated there would be no end of litigation. Witnesses would die or be scattered, and at last, a litigant might return with the same plea that something else had been overlooked, or misunderstood by it or its counsel. The County issued the bonds, they were expended by the Railroad Company, and *at least*, as can even now be shown, $150,000 of them were invested in the County, *a thing difficult to show after so many years*, and after receiving so large a part of the consideration of the bonds, the County repudiates every dollar of its obligations. But, as said by the Circuit Court of Appeals, the question "really is not material." No one can even plausibly contend, against the Circuit Court's findings and the presumptions attending the transactions, that the Railroad Company did not sell the bonds in open market to procure money with which to construct the railroad or pay out the bonds to contractors and supply men, and the holders of such bonds are, therefore, as held by the Circuit Court of Appeals, entitled to the pre-

sumption of being *bona fide* holders for value, etc. (*Rec.* 83.)

The question answered by this court was, consequently, not a moot, but a most pertinent question, and for the foregoing reasons it is unnecessary further to discuss the suggestion that this case ought to be remanded to the Circuit Court for a repetition of the litigation which has pended since March, 1899, nearly ten years.

IV.

Counsel for Green County (*Brief, p. 15*) complain that to Green County's plea of the Fifteen-Year Statute of Limitations to all coupons which had become due fifteen years before the filing of the action Quinlan had made no replication, but that, nevertheless, the Circuit Court of Appeals "disregarded its plea and directed judgment for the bonds and coupons sued on." The fact is that Quinlan confessed the plea by omission to traverse it, and the plea was, consequently, established as to all coupons so maturing, and the mandate of the Circuit Court of Appeals did not direct judgment upon such coupons so barred by limitations, as is contended by counsel, but directed judgment "*for the sum due* on the bonds and coupons in suit," and did not direct "judgment for the bonds and coupons sued on" (*see Rec. p. 73*).

To show beyond peradventure, however, that Quinlan did not demand judgment on coupons barred by limitation, he entered a *remittitur*, as is stated by counsel (*Brief, p. 15*).

V.

Counsel in their brief (*p. 27*) put forth interesting speculations as to what course of reasoning might, peradventure, have induced the County Judge to direct the issuance of the bonds in question, and seem even to suspect of guilt a curious old Kentucky statute then in force; but this suspicion is dispelled by the consideration that the bonds, principal and interest were payable to bearer, at the Bank of America, in New York City, and were, therefore, construable and interpretable according to the law of New York. (*London Assurance Co.* v. *Companie, etc., Co., 167 U. S. 149, 160; Scotland Co.* v. *Hill, 132 U. S. 107, etc., etc.*)

In *London Assurance Co.* v. *Companie, etc., Co.*, this court, through Mr. Justice Peckham, said:

> "Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, Sec. 280, says: 'But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem a result of natural justice. * * * The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said that the general principle in relation to contracts made in one place to be executed in another was well settled; that they are to be governed by the law of the place of performance.'

"The case referred to in the above section is Andrews v. Pond, 38 U. S. 13 Pet. 65 (10:61), in which Mr. Chief Justice Taney, in delivering the opinion of the court, said: 'The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury.' "

VI.

It is contended for Green County that the Green County Court was not a stockholder, because the road did not run entirely through the County (*Brief, p. 37*), *et seq.*, and a number of cases are cited where suits were brought upon conditional subscriptions to compel the subscribers to take the stock and pay for it. These cases have no application whatever to the case at bar, in which contract of subscription was actually executed by the issuance of the stock and payment therefor in bonds of the County to be sold to raise the money wherewith to carry out the railroad's obligation.

We shall not follow learned counsel in the discussion of so many immaterial points as their brief offers, however interesting, but proceed directly to a consideration of the only questions really involved.

VII.

On the exoneration of Green County "from the payment of the capital stock voted in the said County, and authorized to be subscribed by said Green County to the Elizabethtown & Tennessee Railroad" (*p.* 45) we should offer no argument, treating the opinion of this court in 205 U. S. 410, *et seq.*, as conclusive of the question, except for the fact that one of the judges of the Circuit Court of Appeals has dissented from the judgment of that court in our favor. Inasmuch as this case was tried over four years ago upon a special finding of facts accepted by both parties without objection, *and on which both parties demanded the court's judgment*, and inasmuch as the Circuit Court of Appeals after hearing argument upon respondent's demand for a reversal of the judgment of the Circuit Court rendered upon such findings, and petitioner, Green County's, demand that such judgment upon such findings should be affirmed, said Circuit Court of Appeals certified to this court and this court answered question No. 2 (205 U. S. 416) based upon such findings, which together with the questions certified to them constituted the entire record in this court, it is difficult to understand upon what principle this court can now be told that the question so certified to this court, heard by this court upon oral argument and brief, and determined by this court in an opinion so well considered and carefully and elaborately expounded, was really but a moot question not existing in the record at all, and that the labor of this court was in vain.

When the exhaustive and conclusive reasoning of the majority opinion of the Circuit Court of Appeals is considered, an opinion which in the most lawyer-like way deals with the relevant and only questions involved, some of the enunciations of the dissenting opinion are not easily comprehensible.

The dissent (*p.* 84) exclaims the enormous amount involved "three-fourths of a million."

If this were material to a legal inquiry of the kind presented, the suggestion is utterly untenable because it appears from the dissent (*p.* 86) that in *Shortell* v. *Green Co.*, 116 Ky. 108, a number of the bonds of the same issue were invalidated, and this court knows judicially that all bonds not suable in the Federal Court are likewise so invalidated, and there is no evidence that any bonds are outstanding except those involved in Green County's petition in this case and its companion case, No. 352; and all bonds not now in suit are barred by limitation.

Again, the dissent declares:

> "For this the County will obtain nothing. To prevent just such a possible result the legislature provided that subscriptions by counties might be voted conditionally," etc. (*p.* 84.)

It seems to have escaped the learned judge when saying "For this the County will obtain nothing," that *first*, the County got 2500 shares of $100 each of the capital stock of the company (*Finding* 8, *p.* 47); *secondly*, $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green County," (*Finding* 11, *p.* 47); *thirdly*, "the proposed line of said railroad was located through said County from its northern line to its southern line, and within one mile of Greensburg," "about five miles of said railroad" has been constructed, (*Finding* 10, *p.* 47); and *fourthly*, The County got the railroad from its County Seat, Greensburg, to a connection with the Louisville & Nashville Railroad, a great trunk line as this court judicially knows, and within the County "the railway was completed from the northernmost line of the County to Greensburg" (*finding* 12, *p.* 47).

The findings of these facts are among those upon which the Circuit Court of Appeals certified to this court the questions quoted by this court in 205 *U. S. p.* 416. Had the County actually obtained nothing, as misapprehended by the dissenting judge, *the result would have come from the County's failure to require a bond of the Railroad Company for the performance of its covenants, or to otherwise guard its rights.* Without requiring such a bond, or otherwise obtaining security the County must have taken the risk which it did take or *have inserted in its subscription* such conditions precedent as would have effectually *prevented a sale of the bonds.* The County elected to make the bonds salable, although afterward, when the Railroad Company failed to fully carry out its contract the County attempted to visit the consequences thereof upon the bond holders who had furnished the money or material for the construction of the road, and is now endeavoring to destroy the value of the bonds by the contention that they are unsalable and that no purchaser thereof would acquire right or title.

The dissent next asperses the bondholders by the declaration that the bonds, by the County's persistent denial "so long acquiesced in," had become of "little more than the value of wall paper" "as stated at the bar" (*p.* 84).

Being based upon a statement "at the bar" (not of Quinlan's counsel) *instead of upon the record*, this point might be passed without comment, but it is pertinent to say that the Circuit Court of Appeals certified, and this court answered question 2 reciting "assuming the facts to be as found (found by the Circuit Judge) was a *bona fide* purchaser, before maturity of these bonds and coupons for value, entitled to assume," etc., and that the Circuit Court did so find, (Rec. 44) and that *Green County took judgment in the Circuit Court upon such finding* and *insisted in the Circuit Court of Appeals upon an affirmance of the judgment of the Circuit Court in its favor upon*

such finding, and that Green County never suggested an objection or exception to the finding of the Circuit Court until the Appellate Court certified to this court the questions aforesaid, when Green County filed in the Circuit Court of Appeals a certified copy of what purported to be a deposition of respondent's testator, taken upon Green County's plea in abatement, and moved that court "to amend or modify the certificate" (*p.* 71, 2) and the court "on the same day, to wit, March 6, 1906" denied the motion in an order as follows:

> "The motion in this cause to modify or amend certificate of questions certified to the Supreme Court is denied."

The copy of the Quinlan deposition became, of course, no part of the record, because it was only filed upon a motion outside the questions submitted, it was not a paper fileable in an Appellate Court, and it was utterly inadmissible to take to the Appellate Court any part of the evidence in the trial court except by bill of exceptions, and incompetent so to do even by such appropriate method without an objection or exception to a finding of the Circuit Judge, upon the trial of which in the Appellate Court the evidence would be competent. This was recognized by the dissenting judge, for as authority for his statement as to the value of the bonds he invokes a statement "at the bar," and not the copy aforesaid (*p.* 84).

The Circuit Court of Appeals, concerning this point says, *p.* 83:

> "It is suggested that the finding of the court, 'that the plaintiff is a citizen of the State of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was the *bona fide* holder for value of the bonds and

coupons sued on, and fully entitled to sue the defendant thereon in this court' was intended only to say that the citizenship of the plaintiff was such as to entitle him to sue in the Federal Court. *But this court in its question to the Supreme Court construed this finding to be also a finding that the plaintiff was a bona fide holder for value, and the Supreme Court certainly so construed it as is shown in the statement of facts, and we have no doubt correctly. That part of the finding of facts had no relevancy to the question of jurisdiction. If she was a citizen of New York and was the holder of the bonds she was entitled to sue. The question of whether she was a bona fide holder for value was a question upon the merits of the case. The phrase which the court below employed was one peculiar to the law of negotiable instruments and ought to be construed in the sense in which it is there employed. But it really is not material. If, as we hold, the bonds were lawfully issued, the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a bona fide holder for value.*" (Italics ours.)

The dissent is corroborative upon this point as to the certification, for it says, (*p.* 85):

> "In this very case we certified the question as to the presumption upon which a purchaser before maturity for value might act in purchasing bonds without recital."

Although the dissent, at this late day, repudiates the certificate, *p.* 88, we need not further discuss this question. Our side of it is sufficiently supported by the suggestions hereinbefore offered, and, as said by the Circuit Court of Appeals, *p.* 84, the point "really is not material;" but the finding by the Circuit Court is impregnable

no matter when respondent's testator may have acquired the bonds, or what sum he may have paid for them, because, as said by this court in *McClure* v. *Oxford*, 94 U. S. 432, (and in divers other cases) "to be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was," and there can be no plausible contention that the prior holders of these bonds were not *bona fide* holders for value before maturity, but the presumption is that they were, as is above shown. *New Orleans, etc., Co.* v. *Montgomery*, 95 U. S. 16, 18, etc.

The Circuit Court of Appeals was, therefore, unquestionably correct in holding, *p.* 83:

> "The holder of negotiable paper is entitled to the benefit of the presumption *prima facie* that he or some previous holder whose title he has, acquired it in good faith and for value before maturity in the usual course of business and without notice of any circumstances impeaching its validity; and that he is the owner thereof, if it is payable to bearer. 1, Daniel on Neg. Inst., Sec. 812. Nothing is here shown to contravene these presumptions."

In no case could the presumption just noted be more applicable because the bonds were voted to raise money to build a railroad for Green County and other counties; the only basis for the County's subscribing was that the road was a necessary improvement for the County and could not be built without the subscription, and even as late as the trial, November 5, 1904, (*Rec., p.* 44), the respondents were able to show that $150,000 of the bonds, or their proceeds, were expended in Green County, see *Finding* 11, (*p.* 47), and the bonds held by respondents, John Thomas, *et al.*, were received by them for iron furnished the Railroad Company for constructing its railroad, as is above shown. These bondholders are en-

titled to all the presumptions, and entitled to full value of their bonds, whether by payment from the County or by realization of the price thereof obtainable from purchasers, and, accordingly, entitled to have their vendees, or purchasers, obtain all the rights and remedies to which they would be entitled, *for otherwise their market would be destroyed without their fault,* and they are entitled to their market as well as to their action at law.

These doctrines are supported by the decisions of this court.

In *Scotland County* v. *Hill*, 132 U. S. 107, 33 L. Ed. 262, plaintiff had judgment upon coupons on County bonds issued in payment of a subscription to capital stock of a railroad company. The coupons were payable to bearer and the bonds to the railroad company or bearer, in New York.

The order of the County Court stated, as one of the conditions of subscription, that $100,000 of the bonds should be delivered when the road was graded, bridged and tied, the track laid and the cars running between designated points; and the remaining $100,000 of bonds when the road was completed to another point.

One Mety was appointed the County's Trustee to deliver the bonds in exchange for the railway stock upon compliance with the conditions specified in the order, and was required to give bond for performance of his duties.

Shortly before completion of the road certain taxpayers sued to enjoin the delivery of the bonds principally because the subscription by the County was without authority. The Trustee, shortly before completion of the road took an installment of bonds to an adjoining State for delivery to the Railway Company, having heard of the institution of the injunction suit, in order to evade service of process. While there a majority of the justices of the County Court advised him of the company's compliance with its contract by constructing the road and directed him to deliver the first installment of bonds and

to receive the stock. The Trustee acted as directed and took bond of indemnity from the company. The bonds were adjudged, in the suit aforesaid, to be invalid and ordered to be cancelled, and the decree affirmed by the Supreme Court of Missouri. They had been previously declared valid by this court in *County* v. *Thomas*, 94 U. S. 682, and this court declined to reconsider its former decisions to the prejudice of *bona fide* holders of bonds issued prior to change of decision in the State Court, that court having previously held the bonds valid.

Upon delivery by Mety, the Trustee, to the Railroad Company it sold the coupons to divers persons who purchased for value without notice of the injunction suit, or of any infirmity in the bonds. Upon these facts the County requested a charge that if at the times of purchasing coupons the plaintiff, Hill, had actual notice of the pendency of the suit aforesaid he could not recover; but the court instead of so charging, charged that the ownership of the coupons by a prior holder under such circumstances as would protect him against any defense by the County entitled Hill to recover "even if he, when afterwards purchasing for himself or others, had knowledge of the pendency of the Wagner suit" (132 U. S. 115) and the action of the trial court was affirmed by this court.

This court said that Hill might have heard of the Wagner suit and known of Mety's purpose in delivering the bonds to the railroad company, but had no connection with the "conspirators," and at that time had no interest in the coupons, and said:

> "It is said that the construction company received the bonds with actual notice, upon the part of one of its chief officers, of the injunction suit. But there can be no claim that any of the holders of the coupons intermediate between the construction company and Hill had any such notice. Be that as

it may, the question as to such notice was properly submitted to the jury."

Further said (*p.* 116):

"The principles of law by which this question must be determined are well settled. In *Commissioners of Douglas County* v. *Bolles*, 94 U. S. 104, which involved the rights of parties claiming to be *bona fide* holders of certain municipal bonds, issued to a railroad corporation, and by it passed to the contractor who built its track, the court, after observing that the plaintiffs could call to their aid the fact that their predecessors in ownership were *bona fide* purchasers, said: 'And still more, the contractor for building the railroad received the bonds from the County in payment for his work, either in whole or in part, after his work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.' In *Cromwell* v. *Sac County*, 96 U. S. 51, 59, it was said that, with some exceptions that have no relevancy here, 'the rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition.' So in *Roberts* v. *Lane*, 64 Maine, 108, 111, it was said that 'if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle

him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity, as between the original parties.' See also, *Montclair* v. *Ramsdell*, 107 U. S. 147, 159; *Porter* v. *Pittsburg Steel Co.*, 122 U. S. 267, 283; *Mornyer* v. *Cooper*, 35 Iowa, 257, 260; *Kost* v. *Bender*, 25 *Michigan*, 516; *Byles on Bills*, 119, 124."

This careful and elaborate review of authorities, and emphatic enunciation of the law, seems to render unnecessary further citation of authority.

The law as expounded by this court is similarly expounded in England, see *May* v. *Chapman*, 16 *Mees. & Welb.*, 355;

Where an indorsee of a bill sued A. and B. as drawers, the bill being endorsed to C. and by him to plaintiff. A. pleaded that he and B. were partners as brewers, and that B. made and indorsed the bill, using the firm name, in fraud of A. and for his private purposes, *viz.*, to pay a private debt which he owed C., and without A.'s knowledge, etc., of which circumstances C. when he received the bill had knowledge; and that when the bill was endorsed to plaintiff he had similar knowledge. Upon the allegation of C.'s knowledge plaintiff took issue and had a verdict in his favor, the jury finding that C. had no knowledge of the fraud, but that the plaintiff had knowledge of the facts; Held, that the plea was not proved, Pollock, C. B., saying (*p.* 360):

"It appears to me, that an innocent party may transfer a title in the bill to a person who is no party to the original fraud, though he have knowledge of it."

Parke, B. said, *p.* 361:

"Then we must take the facts to be that Gurney made the bill in fraud of his partner, Chapman, that he discounted it with Bousfield who had no knowledge of the fraud; and that plaintiff took it by endorsement from Bousfield, he, the plaintiff, knowing at the time of the circumstances under which it had been originally made; and then the question is whether the eighth plea was proved (stating the plea). I agree that 'notice and knowledge' means not merely express notice but knowledge, or the means of knowledge to which a party wilfully shuts his eyes. But, upon the finding of the jury, it is clear that one of the notices mentioned in the plea is not found, namely, the notice of Bousfield's want of title. The whole that is alleged in the plea must be proved. * * * Both the notices, therefore, alleged in the plea, are necessary to be proved in order to defeat the plaintiff's title, namely, the notice of the original fraud, and the notice of Bousfield's defect of title; and the latter not being proved plaintiff was entitled to recover on this issue."

Platt, B. said:

"It was necessary to avoid the title of Bousfield, and also of the plaintiff, his endorsee; and the defendant did not do this, unless he showed that the plaintiff had notice of the infirmity of Bousfield's title to the bill; otherwise the plaintiff took by all his title. The plaintiff, therefore, must not only know of the original fraud, but of Bousfield's knowledge of it, in order to preclude him from recovering on this issue. The plea would have been defective, if it had stated only notice to the plaintiff of the fraudulent concoction of the bill. The replication,

therefore, put in issue both these notices, and one of them only was proved by the evidence."

It appears, therefore, both upon the decisions of this court and upon the English authorities that Green County has failed to establish its plea or defense, no matter when Quinlan bought the bonds, what price he paid for them, or what knowledge he had of the original transaction between the County and the Railroad Company, and it was essential to Green County's defense that it should show not only all that it now contends for but also that the title of Quinlan's vendors was defective, and this Green County has not even attempted to do.

The judgment of the Circuit Court of Appeals is, consequently, as aforesaid, unquestionably correct.

The first finding, therefore, of the Circuit Court (*p.* 44) "that the plaintiff was then a *bona fide* holder for value of the bonds and coupons sued on" is established regardless of the time when Quinlan purchased, the price he paid, or the knowledge he had of the transaction between the County and the Railroad Company; but, as said by the Circuit Court of Appeals (*p.* 84) "it really is not material" because the bonds being lawfully issued "the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a *bona fide* holder for value."

The whole question, however, as to Quinlan's knowledge, or time of purchase, etc., is immaterial because the cases in which this court has ascribed materiality to such facts are those where the bonds contain recitals *contrary to the truth*, and such recitals are held to estop the County to *state the truth*. There is no such case here. It is not the truth which Quinlan is objecting to the County's stating, but it is an untruth. The point at issue is as to the County's exoneration from an ancient subscription. This court held in its opinion in 205 *U. S.* 410 that there was a presumption that the County *had*

been exonerated. This presumption does not arise from the County's estoppel to tell the truth, but is a presumption of fact, or a *presumption of the truth.* It is *a presumption of exoneration* because upon the facts it becomes probable that the County was exonerated. This court said, *p.* 422:

> "Independent of authority such a presumption exists, and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly. In the case at bar the judge of the County Court was charged with the duty of issuing the bonds upon the performance of a condition precedent. That condition was that the County should be 'fully and completely exonerated from the payment of the capital stock voted by said County and authorized to be subscribed by said Green County to the Elizabethtown & Tennessee Railroad.' The performance of that condition did not necessarily require any formal release or the execution of any paper whatever. It was completely fulfilled, if from any circumstance it should appear that the County had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown & Tennessee Railroad. It would be impossible for any purchaser of the bonds to ascertain whether this condition had been complied with, except by an inquiry which would naturally be made of the judge himself. The judge determined that it had been complied with, and the fact that for thirty-eight years no one has made any claim against the County on account of its supposed liability to subscribe to the stock of the Elizabethtown & Tennessee Railroad shows conclusively that he was right."

The presumption, therefore, announced by this court was not a presumption based upon an estoppel to tell

the truth, but a presumption of the truth, *viz.*, the presumption that the County had been exonerated.

The decision of the Circuit Court of Appeals followed this court's determination of the question propounded and answered, but the dissent vehemently assails this court's conclusion. It says (*p.* 86):

> "I disagree as to the effect of the lapse of time since these bonds were issued upon their validity.
>
> "I can not agree that the liability of this plaintiff rested upon any better foundation when he started this suit in 1899 than if he had sued at date of the earliest maturing coupon. * * * The bonds bear date of April 1, 1871. Now, neither at the date of the subscription, June, 1869, nor at the date of the bonds April, 1871, nor at the date of their issuance between January and April, 1872, had there been any compliance with the condition in respect of exoneration from the prior liability by the execution of any release, exoneration or through the judgment of any court. The only finding of fact in respect to this condition is the 17th finding of fact set out above. That there had been 'no formal or express exoneration' is expressly found. Then upon what facts are we to predicate an exoneration?" etc.

A sufficient answer to this position of the dissent is the announcement by this court (*p. 422*) that "the judge determined that it had been complied with, and the fact that for thirty-eight years no one has made any claim against the county on account of its supposed liability to subscribe to the stock of the Elizabethtown & Tennessee Railroad shows conclusively that he was right."

The dissent says of this determination by this court:

> "But I am unable to regard this as an authoritative point of the opinion. The single question which

was answered related only to whether 'on the facts found' there was 'any presumption' at all that the County had been exonerated. This was answered in the affirmative."

The dissent proceeds:

"It is evident that the court did not mean that a rebuttable presumption of exoneration had become conclusive by lapse of time after the fact of issuance."

Evidently the criticism just noted of the language of this court avails nothing against Quinlan's title, because the determination by this court that there was a presumption was conclusive in Quinlan's favor, unless that presumption was rebutted, and no circumstance in rebuttal of it has even been suggested. Even the dissent admits "if the inquiry is, indeed, whether at this date, thirty-eight years after the subscription, the County can now be regarded as relieved from liability, I should say yes. The lapse of time without an action brought to enforce liability would, undoubtedly, raise a presumption of a release or abandonment," etc. (*pp. 87-8*).

It thus appears that there is no doubt on the part of any one that the County has been exonerated, the only question left between the majority of the court and the dissent is as to when the exoneration took place. It does not assist to refute the claim of exoneration to say that lapse of time does not avail because exoneration before the issuance of the bonds was necessary to their validity. The question for determination was whether or not the exoneration existed, and that question was triable November 5, 1904, when the Circuit Court made its findings of fact, so that the lapse of time was then a circumstance affecting the probability or improbability, not only that exoneration then existed, but that it had always existed,

i. e., that it had been effected before the bonds were issued, and that the County Court and the railroad company so treated it. As aforesaid, the dissent declares:

> "The lapse of time without an action brought to enforce liability would, undoubtedly, raise a presumption of a release or abandonment," etc.

Why? Undoubtedly because an action would probably have been brought had there been no such release or abandonment. The lapse of time, therefore, assists the presumption, because it corroborates the probability of a release having been executed or an abandonment declared, or of no subscription having been made pursuant to the direction to the clerk by the County Court.

If it were important so to do, argument could easily refute the proposition of the dissent that there was a subscription. The condition does not, as contended, presuppose a subscription "from which the County was to be released" (*p. 85*), but simply presupposes a vote and an order thereupon from which the County thought it important to be released. The dissent declares (*p. 86*):

> "But it is not important that no formal subscription was made by the clerk. He was commanded to do a purely administrative act, and he could have been coerced to do it by writ of mandamus."

The County Court in making the release a condition precedent to its subsequent subscription may have had the same fear thus indicated, and, accordingly, exacted the release, but there is certainly nothing in the record to indicate that any subscription was made. It is true that the 17th finding declares "that no formal or express exoneration of said County from the payment of said last-named subscription was ever made or attempted," but the "subscription" here mentioned referred to the sub-

scription that the clerk was ordered to make, and not to any subscription actually made. This is shown by the context. The finding *follows* this language (*p. 49*):

> "It is now, therefore ordered that the clerk of this court, for and on behalf of the County of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

This is no declaration that a subscription had been made, and yet is what the Circuit Judge referred to as "said last-named subscription."

The same County Judge, however, T. R. Barnett, who signed the order directing the clerk to make the subscription also made the order of subscription to the stock of the Cumberland & Ohio Railroad Co. (*p. 45*), and he does not speak of a subscription having been made but, *e contra*, simply of its having been authorized. The order declares that the bonds shall not be issued, etc., "until said County of Green is fully and completely exonerated from the payment of capital stock voted by said County and authorized to be subscribed by said Green County to the Elizabethtown and Tennessee Railroad or any part of the interest therein."

Evidently between the date of this order, June 17, 1869, and the delivery of the bonds, several years afterwards (*pages 46, 47*), the same County Judge who made both orders of subscription and who delivered the bonds determined, as this court held in its decision in *205 U. S. 410*, that the County had been exonerated.

It would certainly be a conclusion absolutely without merit that the County should escape payment of bonds issued to assist in constructing the railroad, after those bonds had been bought for materials and money expended in such construction, upon an assumption that the County had not been exonerated from the Elizabethtown & Tennessee subscription or vote of the County therefor.

The remaining position of the dissent is equally untenable, *viz.*, that Quinlan and predecessors in title "have acquiesced in the attitude of the County" in refusing to pay interest. This acquiescence is said to consist in delay in bringing suit. For such delay many reasons may exist. The bondholders may have lacked financial ability to employ counsel or to pay costs; or they may have been skeptical as to the outcome of an execution, even if judgment were obtained, having possibly observed the progress and result of other suits against delinquent Kentucky counties, *e. g., Campbellsville Lumber Co.* v. *Hubbert, 112 Fed. R. 718, 50 C. C. A. 435.*

A conclusive answer to this point, however, is that the statute of limitations is the criterion of such acquiescence as will affect the plaintiff's claim, and there is no attempt in this case to collect a dollar of any claim barred by limitation.

It is, therefore, clear that the decision of the Circuit Court of Appeals in pursuance of this court's answer to the second question certified to it is conclusive.

Green County is not assisted by the decisions in such cases as *Lytle* v. *Lansing, 147 U. S. 59; 37 L. Ed. 78,* because this court has found from the facts before it therein that neither the holder, nor pretended holder of the bonds, nor any predecessor was a *bona fide* holder, and in that case this court's conclusion was:

> "Upon the whole, it is impossible to avoid the conclusion that the purchases of these bonds by Brackenridge and Lytle were never made in good faith, but were merely fictitious, and that their real ownership is still in someone who is affected with notice of their invalidity, and has endeavored by feigned transfers to get them into the hands of someone who can pose before the court as a *bona fide* purchaser."

In the instant case there is no ground whatever to contend that there were not *bona fide* holders for value before maturity, and without notice such as the Indianapolis Rolling Mills, predecessors of John Thomas & Co. in Case No. 352, heard with this case, and others who bought bonds for cash, and such bondholders are presumed to be *bona fide* holders for value, etc., as above shown.

VIII

The only real question left undetermined by this court's decision in this case, reported in *205 U. S. 410, Quinlan* v. *Green County, Ky.*, is whether the terms upon which the election was called by the order of the County Court June 17, 1869, constitute conditions upon which the validity of the bonds depend, and attach to the bondholders or constitute covenants of the railroad company to and with Green County not affecting the validity of the bonds issued by the County in the hands of the investing public. The commissioners of the railroad company petitioned the County Court of Green County to submit to the voters of the County the question of subscribing stock in the railroad company upon condition "that said company shall locate and construct said railroad through the said County of Green and within one mile of the town of Greensburg, in said County, and shall expend the amount so subscribed within the limits of Green County, and also upon the further condition that said bonds shall not be issued or said County paid any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad until said County of Green is fully and completely exonerated from the payment of the capital stock voted by said County and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon." (*Rec. 45.*)

The County Court accordingly submitted "the question as to whether or not the said County Court shall for and on behalf of said County subscribe $250,000 to the capital stock of the Cumberland & Ohio Railroad conditioned," etc., "as above stated."

Green County's contention is that the purchasers of its bonds, duly issued (*Rec. 46, 47*) and sold in the open market, and delivered to contractors or materialmen for iron, etc. (petition for *certiorari* in *Green County, etc.*, v. *John Thomas, etc., No. 715*, heard with this case, *p. 7*), took no title to or right in such bonds, except subject to the condition that the railroad company should locate and construct its railroad through Green County, a distance of over twenty miles, and within one mile of the town of Greensburg in said County, and "expend the amount so subscribed within the limits of Green County."

The language of the order itself, as is emphasized by the Circuit Court of Appeals (*Rec. 82*), refutes the County's contention, for the order is so drawn as to insure that the exoneration of Green County from the subscription to the Elizabethtown & Tennessee Railroad should be a condition precedent to the issuance of the bonds, and to avoid making the issuance or payment of the bonds dependent upon the location or construction of the road as required of the company by the order or the expenditure in the county of the amount subscribed. Accordingly, as above indicated, the order provides for a vote upon the question of subscribing stock upon condition "that said company shall locate and construct said railroad," etc., "and shall expend the amount so subscribed within the limits of Green County;" and upon the further condition "that said bonds shall not be issued or said County paid any part of the principal or interest on said amount subscribed," etc., "until said County of Green is fully and completely exonerated," etc.

It thus appears, as is demonstrated by the Circuit Court of Appeals, that the draftsman of the order knew

how to create a condition precedent; that he was extremely careful to create such condition of the exoneration from prior vote to subscribe to the Elizabethtown & Tennessee Railroad, and was so careful not to make such condition precedent applicable to the location and construction of the road and expenditure of the amount subscribed in the County that he expressed the provision concerning them before using the language which would beyond peradventure create a condition precedent of the exoneration from the effects of the previous vote to subscribe to another railroad company.

No intention could be more manifest upon the face of a paper than the intention to create a condition precedent out of the exoneration in question, and to avoid constituting a condition precedent out of the provisions concerning the location and construction of the road and expenditure of the amount subscribed.

The motive of the County Court and of the voters, as expressed in the order, is as clear as the language employed in expressing their intent.

The County had previously voted to subscribe $300,000 and directed the clerk to make subscription accordingly (*Finding 16, pp. 48, 49*), and was unwilling to subscribe $250,000 to the stock of another railroad company, unless exonerated from the effects of the first vote, and order; but, on the other hand, the County could not make the location and construction of the road as prescribed, and expenditure in the County of the amount subscribed conditions precedent to the issuance or payment of the bonds, because so to do would defeat the sole purpose of the subscription, *viz.*, to aid in the construction of the railroad.

The statute provides, as pointed out by the Circuit Court of Appeals (*p. 82*), that the bonds should "be payable to *bearer*, with coupons attached, bearing any rate of interest not exceeding 6% per annum, payable semi-annually, *in the city of New York*, payable at such times as they may designate, not exceeding thirty years

from date," thereby indicating the legislative intent that the bonds should be sold in the markets of the world and that the County should have over a quarter of a century to pay them, but should pay coupons semi-annually, thus refuting the idea that the location and construction of the railroad as prescribed, or the expenditure of the amount subscribed, should affect either the issuance or payment of the bonds and coupons.

We believe it is not even contended that the location and construction of the road and expenditure of the money, as aforesaid, should precede the issuance of the bonds. Indeed, such an assumption involves its own refutation, because, however gullible the public, investors could not be expected to advance their money for building roads without even obtaining the bonds or an assurance *that they would ever be issued.* The hypothesis upon which the whole matter proceeds is that the subscription was made to aid the construction of the railroad, and this could not be done if the bonds could not be issued until receipt and expenditure of the proceeds. This point may be dismissed as not debatable.

The idea, however, that the bonds might be issued, but be payable only upon condition that the railroad company should locate and construct the road through Green County, twenty-and-odd miles, within a mile of Greensburg, and expend the total amount subscribed within the County, is as preposterous as the first assumption that they should not be issued in advance of such location, construction and expenditure.

No financiers, no matter in how remote interior of the country, could be so unenlightened as to suppose that investors in the markets of London, Amsterdam or New York, for example, would invest money in bonds conditioned upon the holders becoming surety that a local railroad company would, or could, fulfill its obligations, even if such investors had or could obtain any information enabling them to reach an intelligent conclusion as

to the company's ability and good intentions. But if financiers were mad enough to issue bonds on such terms, they must be willing that such bonds be sold at a ruinous price, a conclusion so improbable as to be inadmissible in any intelligent consideration of the situation. The mere consideration, however, of the suggestion of issuing bonds on such terms renders irresistible the conclusion already sufficiently manifest upon the face of the record itself that the County Court, in the order submitting the question of subscription to the voters, not only did not intend to make conditions precedent the location, construction and expenditure aforesaid, but was extremely careful to avoid so doing, and did signally succeed in so avoiding by the employment of appropriate and clear expression.

The contention of Green County would require the bond actually issued so changed as to read as follows:

UNITED STATES OF AMERICA,
County of Green, State of Kentucky,
For the Cumberland & Ohio Railroad.

"Twenty years after date, the County of Green, in the State of Kentucky, will pay to the holder of this bond the sum of Five Hundred ($500.00) Dollars, with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America in the City of New York, provided, and only upon condition that Green County shall have been released, before this bond was issued, from any obligation upon its vote to subscribe to the stock of the Elizabethtown & Tennessee Railroad, and provided that the Cumberland & Ohio Railroad Company located and constructed its railroad through said County and within a mile of Greensburg in said

County, and expended within the limits of said County the amount subscribed by said County, *viz.*, Two Hundred and Fifty Thousand ($250,000) Dollars.

Or, "Provided that this bond shall not be payable unless the Cumberland & Ohio Railroad Company locate and construct its railroad through Green County, and within a mile of Greensburg and expend the amount subscribed, viz., Two Hundred and Fifty Thousand ($250,000) Dollars within the limits of said County."

The suggestion of the execution of such a bond—and the execution of a bond bearing such meaning is equivalent thereto—and the attempt to float it is too preposterous for serious consideration. The Circuit Court of Appeals notes that it "has been suggested that the company should have expended some other money equal in amount to the bonds," and not the proceeds of the bonds, but responds "such a construction as would lead to the result suggested would leave the company without the ready means to build the road which it was the purpose to provide for" (*Rec. 82*).

The suggestion is, moreover, otherwise easily refuted by the bare consideration that the County was only permitted to subscribe in order to aid the construction of the railroad, and the subscription by each county through which the road was located, if upon the same terms as those which Green County now contends were conditions precedent to her subscription, would leave the railroad company with no money for use, except such as it had without the subscriptions.

Again, the claim that the company must expend $250,000 within the county as a condition precedent to the issuance or payment of the bonds puts the purchasers in the attitude of taking the risk that the railroad will *not only expend the money it receives for the bonds in*

Green County, but enough more to make the par value of the bonds, and will also expend that money in that County. Such a proposition is not entertainable, even for discussion.

Green County's contention involves:

(a) That although the bonds were voted in aid of the construction of the railroad, nevertheless they could not be used in aid of its construction; but that the road must be constructed without the proceeds of the bonds, unless forsooth, the purchasers chose to pay the price of the bonds and then await the result of the railroad company's operations in order to ascertain whether or not they should ever become entitled to the bonds or to their payment.

(b) That although the proceeds of subscriptions to the capital stock of the company constituted the company's means of building its railroad, the County might nevertheless subscribe for, take, vote, and hold the stock subscribed for with only the contingent liability of paying the price subscribed, although it had issued its bonds to be sold in the open market for the highest price obtainable in order that the proceeds of such bonds might be used in constructing the railroad.

(*c*) That the County should obtain the stock subscribed for and have the right to require the proceeds of its bonds issued in payment therefor expended within the limits of the county, but that the bonds were either not to be delivered, or, if delivered, were not to become payable until it should afterward be determined whether or not the company were financially able and willing to complete the road, and should actually complete it, from the northern to the southern boundary of the county, and expend the proceeds of the bonds within the limits of the county.

(*d*) That although the County received the stock and made such disposition of it as it chose, *and although it*

delivered the bonds in payment therefor, and paid interest on such bonds as long as it chose, and although it exacted that the bonds be sold and proceeds expended in the county, nevertheless, if only $249,000, instead of $250,000, were so expended, and if the road were completed only 9-10 or 99-100 of the distance from the northern to the southern boundary of the county, the purchasers of the county bonds *should lose their entire investment* and the County obtain the benefit of their money without obligation to pay anything therefor.

That the County did not so understand its subscription, but understood the contract of subscription to impose the conditions solely upon the railroad company, and not upon the bondholders, is proved by the verbiage of the order of subscription, and the issuance of the bonds and payment of interest thereon; and that the bondholders did not so understand it *is proved by their purchasing and paying for the bonds.* The terms of the subscription are (*p. 45*) that "said company shall locate and construct said railroad," etc., "and shall expend the amount," but in reference to the exoneration aforesaid, the language of the order is "until said County of Green is fully and completely exonerated." The language is thus aptly chosen to require the *exoneration,* no matter how obtained, but only to provide that the railroad company should undertake to construct its road and expend the amount of the subscription.

The conduct of both parties, however, County and railroad company, constitute a contemporaneous construction of the contract refuting the County's present position, consisting in the payment of interest maturing upon the bonds of the County, and acceptance thereof by the railroad company or its vendees.

Thus, the County's issuance of the bonds shows that the construction of the road as required and the expenditure of the amount subscribed were not regarded by the County as conditions precedent to the *issuance,* and the

payment of interest showed that they were not regarded as conditions precedent to the *payment* of the bonds and coupons. Treatment by the County of the provisions concerning construction of the railroad and expenditure of the amount subscribed as conditions precedent to either the issuance or payment of the bonds and coupons was an afterthought; and the County's act in contesting these bonds must have almost, if not completely, destroyed their value in the hands of those who contributed the money or material for the construction of the road, or those to whom those holders had been able to sell them.

The principles above expounded are but those often enunciated by the authorities. It is well established that covenants are independent, and one not a condition precedent as to the other, where the time of performance and of payment are not made coincident, nor performance required to be anterior to payment. These principles have long been understood, as appears in Serjeant Williams note to *Pordage* v. *Cole,* 1 *Wms. Saund.* 320, *note* 1, reviewed in *Cutler* v. *Powell,* 1 *Smith's Lead. Cas.* and note 1, *p.* 14, declaring:

> "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen *before* the thing which is the consideration of the money, or other act, is to be performed; an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his remedy, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." *Citing authorities.*

The note aforesaid to *Cutter* v. *Powell* follows this enunciation of Serjeant Williams with a reference to "*Mattock* v. *Kinglake, 10 A. & E. 50, and Wilks* v. *Smith,*

10 M. & W. 360, where the agreement was to sell land for a sum to be paid at the expiration of four years, and interest in the meantime half-yearly. It was held that the declaration for an installment of interest need not contain an averment of readiness to convey."

These well understood principles constitute the basis of this court's decisions in *Goldsborough* v. *Orr*, *8 Wheat 217*, and *Loud* v. *Pomona, etc., Co., 153 U. S. 564*, and the latter (*p. 578*) cites Serjeant Williams' note aforesaid to *Pordage* v. *Cole*, as well as the earlier case of *Goldsborough* v. *Orr*.

In *Goldsborough* v. *Orr* an action was brought by Orr upon a "short note," and he had judgment for a balance of $2,919.89 with interest, which was affirmed by this court.

The controversy arose out of an agreement dated *May 5, 1818*, whereby Orr sold to Goldsborough houses and lots in Washington, D. C., the price payable in lumber, at Washington, at usual prices, one-half of the lumber deliverable in the current year, the other half in the next year, as wanted by Orr. Also, Orr agreed to take of Goldsborough as much more lumber as would amount, with the price of the property sold, to $10,000 and to give Goldsborough his note payable February 15, 1819, for the additional sum of money; titles were to be made on demand, and the delivery of the lumber to be guaranteed by Com. Rodgers.

In the *Winter of 1818, '19*, or *Spring of 1819*, Goldsborough refused to deliver more lumber to Orr's orders. The houses and lots sold had been duly conveyed, and Goldsborough proved that he delivered lumber as ordered amounting to $7,986.11, and so delivered lumber whenever called for until February 15, 1819, when Orr failed to pay his note then maturing. An extension for payment was granted Orr by Goldsborough, and like default subsequently made by Orr.

The question discussed by this court, through Mr. Justice Story, was whether or not Orr's failure to pay the note constituted a good defense to his action, and this question depended upon the dependence or independence of the covenants. This court concluded that the covenants were independent, saying, *p. 225*:

> "It is observable, that one moiety of the lumber was deliverable in 1818; and as to this, it is clear that the payment of the note could not be precedent. The other moiety was deliverable in the year 1819, as it was wanted by Orr, and of course he might elect to demand the whole before, as well as after the note became due, at his pleasure. If this be so, it could not be within the contemplation of the parties, that the delivery of the lumber should be dependent upon the payment of the note, for the whole might be rightfully demanded before it became due. Nothing is better settled, both upon reason and authority, than the principle that where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other."

The opinion in *Loud* v. *Pomona, etc., Co., supra,* was delivered by Mr. Justice Jackson, and it constituted an elaborate review of authorities, reaching a conclusion, of course, in accordance with the earlier case just considered.

Accordingly, the principles established not only by the English authorities, but by the decisions of this court, forbid the conclusion that the construction of the railroad through Green County, or within a mile of Greensburg, or the expenditure of the amount subscribed by the County within the limits of the County, were conditions precedent to the issuance or to the payment of the bonds and coupons, for the bonds were not only deliverable

forthwith, and were so delivered (the exoneration in question aforesaid having been made), but the interest was payable upon the bonds semi-annually from their issuance, and the bonds were actually issued and interest installments actually paid by the County. These provisions of the contract not being conditions precedent as to the railroad company *a fortiori,* they are not conditions precedent as to the holders of *bonds payable to bearer.* The issuance of the bonds payable to bearer, for the purpose of their being sold in the markets of the world, was itself a fact forbidding such provisions being conditions precedent.

The conclusion of the Circuit Court of Appeals (*p. 81*) was, therefore, irresistible, that the location and construction of the road as required, and the expenditure of the sum subscribed in the County, were not conditions precedent to the issuance or payment of the bonds and coupons; and in strict accord with the principles just invoked from the decisions of the English courts and this court, is that court's conclusion (*p. 81*) that:

> "The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of provisions or stipulations a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent, it will not be held to be such.
>
> "*Stanley* v. *Colt, 5 Wall. 119.*
>
> "*Union Stockyards Co.* v. *Nashville Packing Co., 140 Fed. 701, 704.*
>
> "*Sohier* v. *Trinity Church, 109 Mass. 1.*
>
> "*Greene* v. *O'Connor, 18 R. I. 56.*
>
> "*Scoville* v. *McMahon, 62 Conn. 378.*

" '*Harting* v. *Witte, 59 Wis. 285.*

" 'Conditions have no idiom,' said Virgin, Judge, in *Bucksport, etc., R. Co.,* v. *Brewer, 67 Me. 295.* 'Whether they are precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject matter to which it relates.'

Conditions are not favored, and a provision will not be construed as such unless the intention is clear. *6 Am. & Eng. Ency. of L. 502; Clapham v. Moyle, 1 Lev. 155;* Shep. Touch. 122; *Huff* v. *Nickerson, 27 Me. 106.*

" 'Where the language of an agreement can be resolved into a covenant,' said Bell, Judge, in *Pasehall* v. *Passmore, 15 Penn. St. 295, 307,* 'the judicial inclination is to so construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these it is not permitted to work the destructive effect the law otherwise attributes to it.' "

CONCLUSION.

The haste which was necessary after seeing opposing counsel's brief is our apology for the absence of a more symmetrical arrangement of this one. Nevertheless, we hope that we have rendered some assistance to the court in reaching the correct conclusion as to the principles of law involved.

Eliminating all incidental and collateral questions, the controversy comes at last between the County which seeks the railroad and employs the agency of the railroad company to obtain it, and the investing public who take the

bonds from the railroad company, whether for labor or materials or money wherewith to purchase them. Such bondholders are entitled, for their own benefit, and because of their right to enjoy a market for their bonds, to pass their own good title to all subsequent purchasers, and it is beyond the power of the County to destroy that market by publication of an obstinate design to contest the bonds, no matter what grounds of defense may be alleged. Such a notice to the public necessarily affects the vendible value of such bonds, for it notifies purchasers that they are buying a law suit; but it can not deprive such holders of their right to pass their own good title, for that would virtually destroy the value of their property. Investors purchasing from the railroad company, the agency employed by the County to market its bonds in order to obtain the railroad, can not know the equities between the County and such railroad company, nor the defaults of or probable defaults to be made by the latter, nor can they in Amsterdam, London or New York, for example, appreciate local conditions such as exist in the Knob counties of Kentucky.

Great principles underlie such transactions, and we hope that we have assisted the court in its search for them.

We respectfully pray an affirmance of the judgment of the Circuit Court of Appeals.

EDMUND F. TRABUE,
GEORGE DURELLE,
Counsel for Respondent.

JOHN J. MCHENRY,
JOHN C. DOOLAN,
ATTILLA COX, JR.
Of Counsel.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 252.

GREEN COUNTY, KENTUCKY, PETITIONER,

vs.

JOHN THOMAS, EXECUTOR, HENRY CHIPP[illegible] ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

[illegible]

(21,118.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 352.

GREEN COUNTY, KENTUCKY, PETITIONER,

vs.

JOHN THOMAS' EXECUTOR, HENRY KNIPPENBERG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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a No. 1483.

United States Circuit Court of Appeals, Sixth Circuit.

JOHN THOMAS, Individually and as Executor of Thomas P. Hendricks *et al.*, Plaintiffs in Error,
vs.
GREEN COUNTY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Kentucky.

Record.

Original Transcript Filed Sept. 1, 1905.

Filed Mar. 13, 1906.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

United States Circuit Court of Appeals, Sixth Circuit.

JOHN THOMAS ET AL., Plaintiff- in Error,
vs.
GREEN COUNTY, Defendant in Error.

The plaintiffs in error hereby give notice that they regard only the following parts of the record necessary for consideration of this cause, viz:

All of the record except paragraphs 3 to 69, both inclusive, and 71 to 690, both inclusive, of the amended and paragraphed petition filed February 17, 1898.

The above named paragraphs are not necessary for the consideration of this writ of error, being similar in all respects to paragraph No. 2, so far as bonds are sued on, and paragraph No. 70, so far as coupons are sued on, except as to the amount payable by such bonds and the amount payable by such coupons and the dates of maturity of several coupons.

HUMPHREY, HINES & HUMPHREY,
AYRES, JONES & HOLLETT,
For Pl'ffs in Error.

Ernest Macpherson, Esq., counsel for defendant in error:

We have sent the above statement to the Clerk of the United States Circuit Court of Appeals at Cincinnati this day.

September 8, 1905.

HUMPHREY, HINES & HUMPHREY.

Copy delivered.

ERNEST MACPHERSON &
JOHN W. LEWIS,
Counsel for Defendant in Error.

No. 1483. John Thomas, *et al. vs.* Green County. Statement of parts of Record to be printed. Filed Sept. 8, 1905. Frank O. Loveland, Clerk.

2 Proceedings of the Circuit Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall, in the City of Louisville, on Monday, March 13th, A. D. 1905.

Present: Hon. Walter Evans, Sitting as Circuit Judge.

No. 6361.

JOHN THOMAS, &c.,
vs.
THE COUNTY OF GREEN.

Be it remembered, that heretofore to wit on the 29th day of August, 1894, came the plaintiffs herein by Simrall Bodley & Doolan, their counsel, and filed in the clerk's office of our said court their petition in the above styled case, which said petition is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky, at Louisville, Ky.

JOHN THOMAS, MARIA D. LEACH, SHERLEY D. MURPHY, JESSIE D. WOOD, HELM R. EDSON, W. E. ROCKWOOD, CHAS. B. ROCKWOOD, ELIZA C. HENDRICKS, HARRIET JONES, MRS. R. K. LORD, WABASH COLLEGE, MERIDIAN NATIONAL BANK, HANNAH A. MANSUR, & CHAS. W. MANSUR, the Last Two as Administrators of Wm. Mansur, Dec'd; WM. S. HUBBARD, GEO. B. YANDES, E. R. FORSYTH, INDIANAPOLIS ROLLING MILL COMPANY, J. N. KINNEY, R. J. BRIGHT, J. C. THOMAS, and H. L. BRENEMAN, the Last Two as Executors of Briggs Swift, Dec'd; L. W. HASSELMAN, and J. H. KURTZ, Plaintiffs,

vs.
THE COUNTY OF GREEN, Defendant.

Petition.

The plaintiffs, John Thomas, Maria D. Leach, Sherley D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B.
3 Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, Wabash College, Meridian National Bank, Hannah A. Mansur, and Chas. W. Mansur, the last two as administrators of Wm. Mansur, deceased, Wm. S. Hubbard, Geo. B. Yandes, E. R. Forsyth, Indianapolis Rolling Mill Company, J. N. Kinney, R. J. Bright, J. C. Thomas and H. L. Breneman, the last two as executors of Briggs Swift, deceased, L. W. Hasselman, and J. H. Kurtz, state that the defendant The County of Green, is a municipal corporation created by and organized under the laws of the State of Kentucky and existing in said state, and as such is invested with power to sue

and be sued and to contract and be contracted with, as hereinafter set forth.

The plaintiffs Wabash College, and Indianapolis Rolling Mills Company are corporations created by and organized under the laws of the State of Indiana and now existing in said state. The plaintiff Meridian National Bank is a corporation created and organized under and pursuant to an act of Congress of the United States providing for a system of National Banks, and the amendments thereto, and is located and does business in said State of Indiana. All of the other plaintiffs herein are citizens and residents of the State of Indiana. The plaintiffs Hannah A. Mansur and Charles W. Mansur, are administrators of Wm. Mansur, who is now deceased, and as such are parties to this suit. The plaintiffs J. C. Thomas and H. L. Breneman are executors of Briggs Swift, deceased, and as such are parties to this suit.

Plaintiffs state that they are jointly the owners and holders of all the bonds and coupons hereinafter specifically set forth; that heretofore, to wit, on April 1st, 1871, the defendant The County of Green in the State of Kentucky, pursuant to authority and powers vested in it by law, for a valuable consideration, to wit, the payment by it of its subscription to the capital stock of the Cumberland and Ohio Railroad Company, made, executed and issued its several bonds as hereinafter set forth, some of them being of the denomination of $1,000.00 each; some of them being in the denomination of $500.00 each, some of them being of the denomination of $100.00 each, and to each of said bonds were attached 40 interest coupons being for the semi-annual interest due upon said several bonds at successive intervals of six months from said April 1st, 1871. Said interest coupons upon each of said bonds were serially numbered from 1 to 40 inclusive, and were made executed and issued by said County of Green as a part of and appended to the bonds aforesaid. Each of
1 said bonds was dated April 1st, 1871, was signed by T. R. Barnett as Judge of the County Court of said Green County attested and signed by D. T. Towles as clerk of said county court, and the seal of said county was affixed to each of said bonds, and in each of said bonds said County of Green promised and agreed to pay in twenty (20) years from April 1st, 1871, to the holder of said bond the principal sum mentioned therein, according to the denomination thereof, with interest thereon at the rate of six per cent. per annum payable semi-annually, upon presentation of the proper coupons attached thereto, as hereinbefore stated, both principal and interest being payable at the Bank of America in the City of New York. Each of said coupons was dated April 1st, 1871, and was executed for a valuable consideration as hereinbefore stated, by said County of Green with the name of D. T. Towles clerk as aforesaid, lithographed thereon as the signature thereto, and in each of said coupons the County of Green promised and agreed to pay to the holder thereof the amount therein specified at the Bank of America in the City of New York at the date of maturity thereof, and said coupons upon each of said bonds by their terms became due and payable at successive intervals of six months from said 1st day of April, 1871, according to the serial number thereof.

Plaintiffs say they are the joint holders and owners of the following 28 bonds of the County of Green which were made executed and issued at the times and in the *matter* and upon the terms and for the consideration hereinbefore stated, and which are of the denomination of $1000.00 bonds, and in each of which the defendant promised to pay to the holder or holders thereof the principal sum of $1000.00 in twenty years from April 1st, 1871, upon the terms and with the agreements hereinbefore set forth. Said $1000.00 bonds held and owned by these plaintiffs are numbered respectively 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, of a serially numbered issue of said bonds as hereinbefore set forth.

Plaintiffs are also joint holders and owners of the following mentioned and numbered interest coupons which were made, dated, executed and issued on April 1st, 1871, by defendant and appended to the 22 bonds hereinbefore specifically mentioned as of the denomination of $1000.00 viz: Coupons numbered from 32 to 40 both inclusive (being 9 coupons) upon each of said $1000 bonds. In each of said coupons the defendant promised and agreed to pay to the holder thereof at its maturity the sum of $30.00 at the times and place and in the manner and upon the terms hereinbefore stated.

Plaintiffs say that they are the joint holders and owners of the following 22 bonds of the County of Green which were made, executed and issued at the times and in the manner and upon the terms and for the consideration hereinbefore stated, and which are of the denomination of $500.00 bonds and in each of which the defendants promised and agreed to pay the holder or holders thereof the principal sum of $500.00 in twenty (20) years from April 1st, 1871, upon the terms and with the agreements hereinbefore set forth. Said $500.00 bonds held and owned by these plaintiffs are numbered respectively: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, of a serially numbered issue of said bonds as hereinbefore set forth.

Plaintiffs are also the joint holders and owners of the following mentioned and numbered interest coupons which were made, dated, executed and issued on April 1st, 1871, by the defendant and appended to the 22 bonds hereinbefore specifically mentioned as of the denomination of $500.00 viz: Coupons numbered from 32 to 40 both inclusive (being 9 coupons) upon each of said bonds. In each of said coupons the defendant promised and agreed to pay to the holder thereof at its maturity the sum of $15.00 at the times and place and in the manner and upon the terms hereinbefore stated.

Plaintiffs further say that the- are the joint holders and owners of the following 17 bonds of the County of Green which were made, executed and issued at the times and in the manner and upon the terms and for the consideration hereinbefore stated, and which are of the denomination of $100.00 bonds and in each of which the defendants promised and agreed to pay the holder or holders thereof the principal sum of $100.00 in twenty (20) years from April 1st, 1871, upon the terms and with the agreements hereinbefore set forth.

Said $100.00 bonds held and owned by these plaintiffs are numbered respectively: 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, and 250 of a serially numbered issue of said bonds as hereinbefore set forth.

Plaintiffs are also the joint holders and owners of the following mentioned and numbered interest coupons which were made, dated, executed and issued on April 1st, 1871, by the defendant and
6 appended to the 17 bonds hereinbefore specifically mentioned as of the denomination of $100.00 viz: Coupons numbered from 32 to 40 both inclusive (being 9 coupons) upon each of said bonds. In each of said coupons the defendant promised and agreed to pay the holder thereof at its maturity the sum of $3.00 at the times and place and in the manner and upon the terms hereinbefore stated.

Plaintiffs say that all the bonds and coupons herein mentioned and sued on are now long past due and no part of any of said bonds or coupons or of the interest thereon has ever been paid. All of said bonds became due and payable on April 1st 1891. All of said interest coupons which bear the coupon serial number 32 attached to the several bonds herein sued on became due and payable April 1st, 1887. All of said interest coupons which bear the coupon serial number 33 attached to the said bonds became due and payable October 1st, 1887. All of said interest coupons which bear the coupon serial number 34 attached to the said bonds became due and payable April 1st, 1888. All of said interest coupons which bear the coupon serial number 35 attached to said bonds became due and payable October 1st, 1888. All of said interest coupons which bear the coupon serial number 36 attached to the said bonds became due and payable April 1st, 1889. All of the said interest coupons which bear the coupon serial number 37 attached to said bonds became due and payable October 1st, 1889. All of said interest coupons which bear the coupon serial number 38 attached to the said bonds became due and payable April 1st, 1890. All of said interest coupons which bear the coupon serial number 39 attached to the said bonds became due and payable October 1st, 1890. All of said interest coupons which bear the coupon serial number 40 attached to said bonds became due and payable April 1st, 1891.

Plaintiffs say that in addition to the bonds and coupons hereinbefore specifically mentioned, they are the joint owners and holders of thirty other interest coupons each for the principal sum of $3.00 which said thirty interest coupons are attached to the three $100.00 bonds hereinbefore mentioned as numbered respectively 235, 236, and 237. Ten of said coupons are attached to each of said three several bonds and as attached to each of said bonds are numbered thereon respectively in serial coupon numbers 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31. In each of said thirty last mentioned interest coupons which were made, dated executed and issued on
7 April 1st, 1871, the defendant promised and agreed to pay to the holder thereof at its maturity the sum of $3.00 at the times and place, in the manner and upon the terms hereinbefore stated. All of said interest coupons which bear the serial coupon

number 22 attached to said three bonds Nos. 235, 236 and 237, became due and payable April 1st, 1882. All of said interest coupons which bear the serial coupon number 23 attached to the said three bonds became due and payable October 1st, 1882. All of said interest coupons which bear the serial coupon number 24 attached to said three bonds became due and payable April 1st, 1883. All of said interest coupons which bear the serial coupon number 25 attached to each of the said three bonds became due and payable Oct. 1st, 1883. All of said interest coupons which bear the coupon seria- number 26 attached to said three bonds became due and payable April 1st, 1884. All of said interest coupons which bear the serial coupon number 27 attached to said three bonds became due and payable Oct. 1st, 1884. All *All* of said interest coupons which bear the coupon serial number 28 attached to said three bonds became due and payable April 1st, 1885. All of said interest coupons which bear the coupon serial number 29 att-ched to said three bonds became due and payable October 1st, 1885. All of said interest coupons which bear the coupon serial number 30 attached to said three bonds became due and payable April 1st, 1886. All of said interest coupons which bear the serial coupon number 31 attached to said three bonds became due and payable October 1st, 1886. All of said bonds and coupons are or will be filed herewith as part hereof as one bundle marked "Green County Bond" and plaintiffs are entitled to recover in addition to the face value, or principal amount of said bonds and coupons, interest thereon from the time or times such principal amounts became respectively due and payable.

Wherefore, plaintiffs pray judgment against the defendant for the sum of $40,700.00 with interest from April 1st 1891, and the further sum of $1221.00 with interest from April 1st, 1891, and the further sum of $1221. with interest from October 1st, 1890, and the further sum of $1221.00 with interest from April 1st, 1890, and the further sum of $1221.00 with interest from October 1st, 1889, and the further sum of $1221.00 with interest from April 1st, 1889, and the further sum of $1221.00 with interest from October 1st, 1888, and the further sum of $1221.00 with interest from April 1st, 1888, and the further sum of $1221.00 with interest from October 1st, 1887,
8 and the further sum of $1221.00 with interest from April 1st, 1887, and the further sum of $90.00 with interest from April 1st, 1887, and they pray for their costs herein expended, and for all other proper general relief equitable or special.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Plaintiffs.

STATE OF KENTUCKY, *County of Jefferson, set:*

John C. Doolan, says that he is one of the attorneys for the plaintiff- in this action who are all absent from the State of Kentucky, and he believes the statements of the foregoing petition are true.

JOHN C. DOOLAN.

Subscribed and sworn to before me by John C. Doolan, this August 29th, 1894.

My commission expires Feb. 13th, 1898.

A. M. RUTLEDGE,
Notary Public, J. C., Ky.

Upon which petition there issued the following process:

The President of the United States of America to the Marshal of Kentucky District, Greeting:

You are commanded to summon The County of Green to answer on the first day of next October term of the Circuit Court of the United States for the District of Kentucky, to be held at the City of Louisville, a petition against it in said court by John Thomas, *et al.*, and warn it that upon its failure to answer the petition will be taken for confessed or it will be proceeded against for contempt, and you will make due return of this summon on the first day of the next term of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 29th day of August, in the year of our Lord, 1894, and of our Independence the 119th.

[SEAL.] THOS. SPEED, *C. C. C., K. D.*,
By HENRY F. CASSIN, *Deputy.*

Upon which the marshal made the following return:

Executed Sept. 27th, 1894, on W. H. Milby County Judge of Green County, by delivering to him a true copy of the within summons. This 27th day of Sept., 1894.

JAS. BLACKBURN,
U. S. Marshal,
By G. W. HUNTER,
Deputy M.

9 And on January 10th, 1895, there issued the following Alias Summons:

The President of the United States of America to the Marshal of the Kentucky District, Greeting:

You are hereby commanded to summon the County of Green, Hon. J. L. Hambleton, County Judge of Green County, to answer on the first day of the next February term of the Circuit Court of the United States, for the District of Kentucky, to be held at the City of Louisville, a petition against it in said court by John Thomas and others, and warn it that upon its failure to answer, the petition will be taken for confessed or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district

this 10th day of January, in the year of our Lord 1895, and of our Independence, the 119th.

[SEAL.]

THOS. SPEED, *C. C. C., K. D.*,
By HENRY F. CASSIN, *Deputy.*

Upon which the marshal made the following return:

Executed January 11th, 1895, on Hon. J. L. Hambleton, County Judge of Green County, Ky., by delivering to him a true copy of the within summons. This 11th day of January, 1895.

JAS. BLACKBURN.
U. S. Marshal,
By G. W. HUNTER,
Deputy M.

And on the 4th day of October, 1897, came the defendant by Ernest Macpherson its attorney and filed its special demurrer to the plaintiffs' petition herein. It is ordered that said demurrer be set for hearing November 23rd, 1897.

The special demurrer above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

10 No. 6361.

JOHN THOMAS ET AL., Plaintiffs,
vs.
GREEN COUNTY, Defendants.

Special Demurrer to Petition.

The defendant Green County, demurs specially to the petition herein because J. C. Thomas and H. L. Breneman, Hannah A. Mansur and Charles W. Mansur, named as plaintiffs have not legal capacity to sue in this court they being personal representatives and not having taken out ancillary administration in this State of Kentucky and they being non-residents of the state.

ERNEST MACPHERSON,
JOHN W. LEWIS,
BYRON BACON,
Att'ys for Green County.

And on the 23rd day of November, 1897, came the plaintiffs by John G. Simrall their attorneys. Came also the defendant by Ernest Macpherson its attorney. This cause coming on to be heard upon the special demurrer of defendant to the plaintiffs' petition, herein, and having been argued by counsel, and the court being fully advised thereof, it is ordered that said special demurrer be and the same is hereby overruled.

Came again the plaintiffs by their said attorney and on their

motion it is ordered that they do have thirty days from this date to file letters of administration; and to execute bond required by law.

Came again the defendant by its attorney and moved the court to require the plainitffs to paragraph their petition herein, and the court not being advised thereof, takes time.

It is ordered that counsel do file their briefs herein, within ten days.

And on the 22nd day of December, 1897, Letters of Administration and Bond were filed in the clerk's office, and an amended petition was tendered, which said letters, bond and amended petition are as follows:

11 STATE OF OHIO, *Hamilton County, ss:*

Whereas, Briggs Swift, late of the County of Hamilton and State of Ohio, died, leaving a last will and testament, (a true copy whereof is hereto attached) which said will has been duly proven and admitted to probate and record by our probate court, within and for the county aforesaid on the 20th day of March, A. D., 1891.

Know ye therefore, that the said probate court has granted unto Joseph C. Thomas and Herbert L. Breneman, the executors in said will named, letters testamentary thereon, hereby granting to said executors all and singular the power necessary and by law required to enable them to take an inventory of, collect, sue for, and recover, all and singular, the goods chattels and credits of the said deceased; and out of the same, or such part thereof as shall come to their hands, the debts of the said deceased, and the legacies *is* in said will named, to pay and discharge according to law, and to the will of said testator, and the same fully to administer in all things, as required by law.

And the court has appointed W. W. Johnson, Elmore Cunningham, and C. M. Holloway, to appraise, on oath or affirmation, all and singular, the goods, chattels and credits of the said deceased.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said probate court, at Cincinnati, this 20th day of March, in the year of our Lord one thousand eight-hundred and ninety one.

[SEAL.] HOWARD FERRIS,
Probate Judge.

STATE OF OHIO, *Hamilton County, ss:*

Probate Court.

I, Howard Ferris, Sole Judge and *Ex-officio* clerk of the Probate Court within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy of letters testamentary issued unto Joseph C. Thomas and Herbert L. Breneman, under the will of Briggs Swift, late of this county, deceased, as the same appear from the records and files of said court. In testimony whereof, I have

hereunto set my hand and affixed the seal of said court at Cincinnati, this 19th day of Dec. A. D., 1891.

[SEAL.] HOWARD FERRIS,
Probate Judge & ex Officio Clerk,
By CHAS. E. JAMES,
Deputy Clerk.

12 Know all men by these presents, that, we, Joseph C. Thoms and Herbert L. Breneman, executors of the estate of Briggs Swift, deceased, as principals, and —— —— as sureties, are held and firmly bound unto The Commonwealth of Kentucky, in the sum of one thousand dollars, to be paid to the said Commonwealth of Kentucky, executors, administrators or assigns, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents. Signed by us this — day of December, A. D. Eighteen hundred and ninety-seven.

The condition of the above obligation is such that whereas an action is now pending in the Circuit Court of the United States for the District of Kentucky, wherein these principals and others are plaintiffs and Green County, Kentucky, is defendant, and whereas said principals are non-residents of said Commonwealth of Kentucky and under the statutes of said commonwealth required to enter into a bond conditioned to pay any debt due by their decedent to any resident of said commonwealth to the extent of assets which may come into their hands; now therefore, if they shall well and truly pay any debt due by their decedent to any resident of said Commonwealth of Kentucky to the extent of assets which may come into their hands in said proceeding, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

J. C. THOMS,
H. L. BRENEMAN,
Executors of Estates of Briggs Swift, Deceased.
FIDELITY & DEPOSIT CO. OF MARYLAND,
By JOSEPH S. ODION,
Gen. Ag't & Att'y in Fact. [SEAL.]

Executed in our presence:
ETTA R. EVERETT.
WM. K. MAXWELL.

Witness as to Fidelity & Deposit Co. of Maryland,
TEMPLE BODLEY.
JNO. G. SIMRALL.

In the Circuit Court of the United States for the District of Kentucky.

13 JOHN THOMAS, MARIA D. LEACH, J. C. THOMAS, and N. L. BRENEMAN, the Last Two Named as Executors of Briggs Swift, Deceased, *et al.*, Plaintiffs,

vs.

THE COUNTY OF GREEN, Defendant.

Amended Petition.

The plaintiffs by leave of court, amend their petition and state that since the bringing of this suit the estate of William Mansur deceased, was settled about a year ago, and his personal representative discharged and the only heirs, descendants and parties interested in his estate are Hannah A. Mansur and Charles W. Mansur, who now own the interest of the said William Mansur, in the Green County bonds referred to herein.

They are non-residents of the State of Kentucky and citizens and residents of the State of Indiana, and are now made parties plaintiff herein.

J. C. Thomas is named in the petition as one of the executors of Brigg Swift, deceased. The real name is J. C. Thoms, who is a citizen and resident of the State of Ohio, and he as such executor is made party plaintiff herein and the mistake in name is hereby corrected, and plaintiffs continue to pray as before.

SIMRALL, BODLEY & DOOLAN, *Att'ys.*

John G. Simrall says that he is one of the attorneys for plaintiffs in the above styled action and that the statements contained in the amended petition are true.

JNO. G. SIMRALL.

Subscribed and sworn to before me — John G. Simrall this — day of December, 1897. My commission expires Jan. 27, 1900.

I. V. CORLEY,
N. P., J. C., Ky.

And on the 18th day of January, 1898, the court being duly advised of the defendant's motion to require the plaintiffs to
14 paragraph their petition herein, it is therefore considered by the court that said motion be and the same is hereby sustained, and said plaintiffs are ordered to paragraph their petition.

It is further ordered that the plaintiffs do have thirty days from this date within which to file an amended petition herein.

Circuit Court of the United States, Sixth Circuit, District of Kentucky, at Louisville, Ky.

JOHN THOMAS, MARIA D. LEACH, SHERLEY D. MURPHY, JESSIE D. WOOD, HELM R. EDSON, W. E. ROCKWOOD, CHAS. B. ROCKWOOD, ELIZA C. HENDRICKS, HARRIET JONES, MRS. R. K. LORD, WABASH COLLEGE, MERIDIAN NATIONAL BANK, HANNAH A. MANSUR & CHAS. W. MANSUR, WM. S. HUBBARD, GEO. B. YANDES, E. R. FORSYTH, INDIANAPOLIS ROLLING MILL CO., J. N. KINNEY, R. J. BRIGHT, J. C. THOMS, and H. L. BRENEMAN, the Last Two as Executors of Briggs Swift, Dec'd; L. W. HASSELMAN, and J. H. KURTZ, Plaintiffs,

vs.

THE COUNTY OF GREEN, Defendant.

Amended and Paragraphed Petition.

Par. 1. The plaintiffs John Thomas, Maria D. Leach, Sherley D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, Wabash College, Meridian National Bank, Hannah A. Mansur and Chas. W. Mansur, Wm. S. Hubbard, Geo. B. Yandes, E. R. Forsyth, Indianapolis Rolling Mill Company, J. M. Kinney, R. J. Bright, J. C. Thoms and H. L. Breneman, the last two as executors of Briggs Swift, deceased, L. W. Hasselman, and J. H. Kurtz come and by leave of court, amend and paragraph their petition herein and state that the defendant The County of Green, is a municipal corporation created by and organized under the laws of the State of Kentucky and existing in said State, and as such is invested with power to sue and be sued and to contract and to be contracted with, as hereinafter set forth.

The plaintiffs Wabash College and Indianapolis Rolling Mill Company are corporations created by and organized under the laws of the State of Indiana and now existing in said state. The plaintiff Meridian National Bank is a corporation created and organized under and pursuant to an act of Congress of the United States providing for a system of National Banks, and the amendments thereto, and is located and does business in said state of Indiana.

The plaintiffs Hannah A. Mansur, and Chas. W. Mansur, at the time of filing the original petition herein, were administrators of William Mansur, deceased, and as such were made parties to this suit. Since the filing of said original petition, the estate of Wm. Mansur, deceased, has been settled, his personal representatives discharged and his estate distributed and the only heirs or descendants or persons interested in said estate of Wm. Mansur, deceased, are Hannah A. Mansur, and Chas. W. Mansur, to whom the interest of Wm. Mansur in the bonds hereinafter sued on were distributed and said Hannah A. Mansur and Chas. W. Mansur, in their own right now own the interest of Wm. Mansur in the bonds hereinafter mentioned. And said Hannah A. Man——*suant to an act*

of Congress of the United States provid——jointly with the other plaintiffs to this suit, interested in and the owners of the bonds hereinafter sued on.

By mistake in the original petition herein, the name of "J. C. Thomas" is given as one of the executors of Briggs Swift, deceased, and it is stated that said "J. C. Thomas" and H. L. Breneman are citizens and residents of the State of Indiana. In point of fact "J. C. Thoms" (instead of "J. C. Thomas") and H. L. Breneman are executors of Briggs Swift, deceased, and as such, are made parties to this suit and as such, jointly with the other plaintiffs herein own the bonds sued on in this action.

Said J. C. Thoms and H. L. Breneman, are both citizens and residents of the State of Ohio. All of the other plaintiffs herein are citizens and residents of the State of Indiana.

Plaintiffs state that they are jointly the holders and owners
16 of all the bonds and coupons hereinafter specifically set forth; that heretofore to-wit, on April 1st, 1871, the defendant the County of Green, in the State of Kentucky, pursuant to authority and powers vested in it by law, for a valuable consideration, to wit, the payment by it of its subscription to the capital stock of the Cumberland and Ohio Railroad Company made, executed and issued its several bonds as hereinafter set forth, some of them being of the denomination of $1000.00 each, some of them being of the denomination of $500.00 each, some of them being of the denomination of $100.00 each, and to each of said bonds were attached 40 interest coupons, being for the semi-annual interest due upon said several bonds at successive intervals of six months from said April 1st, 1871. Said interest coupons upon each of said bonds were serially numbered from 1 to 40 inclusive, and were made, executed and issued by said County of Green as a part of and appended to the bonds aforesaid. Each of said bonds was dated April 1st, 1871, was signed by T. R. Barnett as Judge of the county court of said Green County and attested and signed by D. T. Towles as clerk of said county court, and the seal of said county was affixed to each of said bonds, and in each of said bonds of said County of Green promised and agreed to pay in twenty (20) years from April 1st, 1871, to the holder of said bond the principal sum mentioned therein, according to the denomination thereof, with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons attached thereto, as hereinbefore stated both principal and interest being payable at the Bank of America in the City of New York. Each of said coupons was dated April 1st, 1871, and was executed for a valuable consideration, as hereinbefore stated, and was executed by said County of Green with the name of D. T. Towles, clerk as aforesaid lithographed thereon as the signature thereto, and in each of said coupons the County of Green promised and agreed to pay to the holder thereof the amount therein specified at the Bank of America in the City of New York at the date of maturity thereof, and said coupons upon each of said bonds by their terms became due and payable at suc-

cessive intervals of six months from said 1st day of April, 1871, according to the serial number thereof.

No part of any of the bonds or coupons sued upon in this action has ever been paid and all of said bonds and coupons will, if required, be filed herein, as parts hereof, marked respectively
17 by their serial numbers, as set forth in the following paragraphs of this amended petition.

Par. 2. Repeating all the allegations of the first paragraph herein, plaintiffs state that heretofore, to-wit, on April 1st, 1871, the defendant, the County of Green in the State of Kentucky, pursuant to authority and powers vested in it by law, for valuable consideration, to-wit, the payment by it of its subscription to the capital stock of the Cumberland and Ohio Railroad Company, made, executed and issued its certain bond, bearing the serial number 84 for the principal sum of $1000.00 dated April 1st, 1871, which said bond is in the words and figures as follows:

No. 84. "UNITED STATES OF AMERICA. $1000.00.
County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date the County of Green in the State of Kentucky, will pay the holder of this bond the sum of one thousand dollars, with interest thereon, at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the City of New York.

In testimony whereof, the judge of said County of Green has hereunto set his hand and affixed the seal of said county, on the 1st day of April, A. D., 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

D. T. TOWLES, *Clerk.* [SEAL.]
T. R. BARNETT, *Judge.*"

Said bond was signed by T. R. Barnett, as Judge of the county court of said Green County, and attested and signed by D. T. Towles as clerk of said county court, and the seal of said county affixed to said bond, and in said bond, said County of Green promised and agreed to pay in twenty years from April 1st, 1871, to the holder of said bond the principal sum of $1000.00 mentioned therein, with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons attached thereto, as hereinbefore stated, both principal and interest being payable at the Bank of America, in the City of New York.

Plaintiffs say that they are the joint holders and owners of said bond, having purchased the same for a valuable consideration after it had been executed, issued and delivered by the County of Green in payment of its subscription to the capital stock, of the Cumber-

land and Ohio Railroad Company; that said bond is now
18 due and wholly unpaid, although payment thereof, has been repeatedly demanded of the defendant and at the place of payment designated in said bond.

Wherefore, plaintiffs pray judgment against the defendant, the County of Green for the sum of $1000.00 with interest at the rate of six (6) per cent. per annum, from April 1st, 1891, and their costs herein expended and they pray for all other and further relief, equitable, general and special.

Par. 70. Repeating all the allegations of the first paragraph herein, plaintiffs state that heretofore, to-wit, on April 1st, 1871, the defendant, the County of Green in the State of Kentucky, pursuant to authority and powers vested in it by law, for valuable consideration, to-wit, the payment by it of its subscription to the capital stock of the Cumberland and Ohio Railroad Company, made, executed and issued its certain coupon, which was attached to its certain bond, which said bond is for the principal sum of $1000.00, and is dated April 1st, 1871, and bears the serial number 84 of an issue of bonds, made by said County of Green, as of date April 1st, 1871.

Said coupon is one of forty coupons attached to said bond No. 84 of the coupons attached to said bond and is in words and figures as follows:

"No. 33.

The County of Green, in the State of Kentucky,

Will pay thirty dollars to bearer, at the Bank of America, in the City of New York, on the 1st day of Oct., 1887, being the semi-annual interest on county bond, No. 84, dated the 1st day of April, A. D., 1871.

$30. D. T. TOWLES, *Clerk.*"

Said coupon was executed by the County of Green by causing the signature of D. T. Towles, then Clerk of the County Court of said county to be lithographed thereon and in said bond, No. 84, to which said coupon was and is attached, it is expressly provided that interest thereon "shall be paid at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons hereto, attached;" and it is further recited in said bond said D. T. Towles, Clerk of said County Court, has signed the coupons attached to said bond.

Said bond, No. 84, to which this coupon in this paragraph
19 mentioned is attached, was executed by the County of Green, by causing the same to be signed by T. R. Barnett, then Judge of the County Court of said county, and by causing the seal of said Green County Court to be affixed thereto, and by causing the same to be attested and signed by D. T. Towles, then Clerk of the County Court of said County.

Said bond, No. 84, and the coupon herein mentioned, No. 33, which was attached thereto, were both executed, issued and delivered by the said County of Green, in payment of its subscription to the

capital stock of the Cumberland and Ohio Railroad Company, and the same were purchased for a valuable consideration by these plaintiffs, who are now joint owners and holders thereof.

In said Coupon, No. 33, hereinbefore mentioned the County of Green promised and agreed to pay to bearer the sum of $30, on the 1st day of October, 1887, at the Bank of America, in the city of New York. No part of said coupon or the interest thereon has been paid, although payment thereof has been repeatedly demanded of the defendant and at the place of payment.

Wherefore, plaintiffs pray judgment against the defendant, the County of Green, in the State of Kentucky, for the sum of $30.00, with interest from the 1st day of October, 1887, and their costs herein expended, and they pray for all other and further relief.

Paragraph 691.

Wherefore, the premises considered, plaintiffs pray judgment upon all the bonds and coupons herein mentioned against the defendant the County of Green, for the sum of $40,700.00, with interest from April 1st, 1891, and the further sum of $1,221.00, with interest from October 1st, 1890, and the further sum of $1,221.00, with interest from April 1st, 1890, and the further sum of $1,221.00 with interest from October 1st, 1889, and the further sum of $1,221.00, with interest from April 1st, 1889; and the further sum of $1,221.00, with interest from October 1st, 1888, and the further sum of $1,221.00, with interest from April 1st, 1888, and the further sum of $1,221.00, with interest from October 1st, 1887, and the further sum of $1,221.00 with interest from April 1st, 1887, and the further sum of $75.00 with interest from April 1st, 1887, and they pray for their costs herein expended and for all general and proper relief.

SIMRALL BODLEY & DOOLAN,
Att'ys for Plaintiffs.

John C. Doolan says he is one of the attorneys for the
20 plaintiffs in this action, who are all absent from the State of Kentucky, and he believes the statements of the foregoing amended petition are true.

JOHN C. DOOLAN.

Subscribed and sworn to before me by John C. Doolan this 17th day of February, 1898.

I. V. CORLEY,
N. P., J. Co., Ky.

My commission expires January 27th, 1900.

And on the 21st day of February, 1898, came the defendant by its attorneys and on its motion it is ordered that it do have thirty days from this date within which to file answer herein.

And on the 17th day of March, 1898, came the defendant by its attorneys, and on its motion it is ordered that it do have twenty days additional time within which to file its answer herein.

And on the 15th day of March, 1898, came the complainants herein by their attorneys Simrall Bodley & Doolan, and filed in court the bonds and coupons sued upon in the petition and amended petition herein including 28 bonds of the denomination of one thousand dollar bonds, 22 bonds of the denomination of five hundred dollar bonds, and 17 bonds of the denomination of one hundred dollar bonds, all dated, executed and issued by the County of Green as of April 1st, 1871, together with nine coupons attached to each of said bonds for the semi-annual interest thereon, which coupons attached to each of said bonds bear the serial numbers from 32 to 40, both inclusive.

The 28 thousand dollar bonds herein filed are serially numbered respectively 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120.

The 22 five hundred dollar bonds herein filed are serially numbered as follows respectively, 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188; 189, 190, 191, 194, 195 and 196.

The 17 one hundred dollar bonds herein filed are serially
21 numbered as follows, respectively: 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, and 250.

In addition to the bonds hereinbefore specifically mentioned and the nine coupons attached to each of said bonds bearing the serial coupon numbers 32 to 40, both inclusive, plaintiffs file herein 30 other coupons being ten coupons attached to each of the three one hundred dollar bonds, numbered 235, 236 and 237 respectively. Said ten coupons as attached to each of said three last mentioned one hundred dollar bonds are respectively numbered serially as coupons Nos. 22 to 31, both inclusive. The bonds and coupons herewith filed are to be put by the clerk into the vault of the clerk's office and there kept after endorsing each bond as filed in this case.

And on the 28th day of March, 1898, came the defendant by Ernest Macpherson its attorney and filed its answer herein, as follows:

Circuit Court U. S., Sixth Circuit and District of Kentucky.

THOMAS, ETC., Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Answer.

Par. 1. The defendant Green County, for answer herein to the petition and amended petition denies that it has or ever had power

to contract or be contracted with as is set forth in the petition of the plaintiff and denies that it has any knowledge or information sufficient to form a belief as to whether the Wabash College or the Indianapolis Rolling Mill Co. are or ever were corporations existing under the laws of any state; and denies that J. C. Thomas and H. L. Brenenan as executors of Briggs Swift, deceased, jointly with the other plaintiffs own the bonds or coupons or any of them sued on in this action; and denies that the plaintiffs are jointly the owners or holders of all the bonds or coupons or any of them in the petition set forth, and denies that they were such at the commencement of this action; and defendant denies that heretofore to-wit, on April 1st, 1871, or at any time, this defendant pursuant to authority or power vested in it by law for a valuable con-
22 sideration, to-wit, the payment by the defendant of its alleged subscription to the capital stock of the Cumberland and Ohio Railroad Company or for any other consideration made or executed or issued its several or any bonds or coupons as in said petition or amended petition set forth of any denomination whatever, and denies that any of the coupons in said pleadings of plaintiffs mentioned were ever issued or made or executed by this defendant as a part of said alleged bonds or appended to the same; and denies that any of said bonds or coupons were ever issued by this defendant pursuant to authority or powers vested in it by law, and denies that any of said bonds or coupons were signed by D. T. Fowles as clerk of said Green County Court; and denies that in each or any of said bonds or coupons this defendant promised or agreed to pay in twenty years from April 1st, 1871, to the holder of said bonds, the principal sum or sums therein mentioned or any other sum, with interest thereon at the rate of six per centum per annum payable semi-annually upon presentation of proper coupons attached thereto, both principal and interest being payable at the bank of America in the City of New York; and denies that in each or any of said alleged coupons this defendant promised or agreed to pay the holder thereof the amount therein specified at any time or place; and denies knowledge or information sufficient to form a belief as to whether any of the plaintiffs ever purchased the said bonds or coupons, or any of them, for a valuable consideration, and denies that any or all the plaintiffs ever purchased the said bonds or coupons, or any of them, for a valuable consideration after it, or they had been executed, issued or delivered by the county of Green in payment of its alleged subscription to the capital stock of the Cumberland and Ohio Railroad Company; and denies that this defendant ever subscribed to the capital stock of said road; and denies that any of said bonds or coupons are now or ever were due; and denies that payment of same has been repeatedly demanded of this defendant at the place of payment.

Par. 2. The defendant Green County, further answering herein denies that it ever executed or delivered any of the bonds or coupons mentioned in this petition.

Par. 3. The defendant Green County, says that heretofore to-wit, on the 17th day of June, 1869, an order was pretended to be entered

in the Green County Court which order was not made by the said county court, and which pretended order recited that the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said
23 company, requested the County Court of Green County to order an election in the said county of Green and submit to the qualified voters of said county the question whether said court should subscribe for and on behalf of said county $250,000 to the capital stock of said Railroad company payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date, upon the condition that said company should locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county, and should expend the amount to be subscribed within the limits of Green County, and also upon the further condition that said bonds should not be issued or said county pay any part of either principal or interest of said amount subscribed as aforesaid until said county of Green should be completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company, and that in said pretended order, not made by the said county court, an election by the qualified voters of Green County was ordered to be held on the 3rd day of July, 1869, to vote on the question as to whether or not the said county court of Green County should for and on behalf of the said county of Green, subscribe $250,000 to the capital stock of the said railroad company, conditioned and to be paid as above stated; and defendant says that thereafter one Thomas R. Barnett, and not the county court of Green County, and not authorized thereto by any law, pretended to authorize the clerk of said court to enter into a pretended subscription for the sum aforesaid of the capital stock of said railroad company which pretended order said clerk never obeyed and by the express terms of which order the subscription was to be paid in bonds and coupons of said county as prescribed in said pretended order of submission to the vote of the people and the subscription to be made under and upon the condition set out in said pretended order, that is to say, that said bonds should not be issued or said county to pay any part of the principal or interest on said amount subscribed, illegally as aforesaid, to said railroad company until said company should locate and construct said road through the said county, and said county should be exonerated fully and completely from the payment of the capital stock subscribed by it to said Elizabethtown and Tennessee Railroad Company; and the defendant says that any bonds or coupons of Green County that were ever obtained from it, or
24 purporting in any way to be issued by it, or to be executed by any officer of Green County, which includes all the bonds and coupons in the pleadings of plaintiffs mentioned, were obtained and issued in violation of law and in disregard of the conditions of subscriptions as aforesaid, even if said pretended orders had been valid and said pretended election held according to law, and that said bonds herein sued on, even if pretended orders had been valid,

do not conform to law; the defendant says that no part of any of the proceeds of any of said pretended bonds or coupons was ever expended in Green County for locating or constructing any part of the Cumberland and Ohio Railroad in said county, and that the Cumberland and Ohio Railroad never constructed any road in Green County; that there is no Cumberland and Ohio Railroad Company or any other railroad, running through Green County; that there are only four and one-fifth miles of railroad in Green county and the four and one fifth miles of railroad were built, located and constructed and made by persons other than the Cumberland and Ohio Railroad Company, and not with the proceeds of any of the pretended bonds or coupons ever issued or pretended to have been issued by Green County; that any bonds or coupons alleged or pretended to have been issued by any officer or agent of Green County on account of said alleged subscription were issued in disregard of the pretended subscription and were without any consideration and were void.

The defendant says said county was not completely or at all exonerated by said railroad company from the payment of the capital stock by the said county subscribed to said Elizabethtown and Tennessee Railroad Company; the defendant says that said Thomas R. Barnett was warned and advised not to attempt to deliver any of said alleged bonds or coupons until said conditions had been complied with, and that the said Cumberland and Ohio Railroad Company and others who obtained the said bonds or coupons from the said Barnett had notice and well knew said conditions had not been complied with, and the assignors and transfer-s of plaintiffs likewise knew of the non-performance of the said conditions and that said bonds were illegally obtained, and the plaintiffs are not *bona fide* holders or owners jointly of any of said bonds or coupons for value; and defendant says if the plaintiffs have any interest in said bonds or coupons, or any of them, some of the plaintiffs obtained some of the said bonds and coupons when they were dishonored; and the defendant further says the bonds and coupons in the plaintiffs' plead——

25 said pretended order of submission the vote of the people——

Par. 4. The defendant further says that the bonds and coupons in the petition mentioned were obtained from it by the fraud, covin and misrepresentations of plaintiffs, or those under who they claim and the plaintiffs are not the *bona fide* holders or owners of said bonds or coupons for value.

The defendant prays that each of the plaintiffs be compelled to answer under oath the interrogatories hereto appended and having fully answered it prays to be dismissed hence with its costs.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Att'ys for Deft.

COMMONWEALTH OF KENTUCKY, *County of Green:*

The affiant D. T. Towles, says he is the judge of the Green County Court, and that he now believes the statements contained in the foregoing answer to be true.

D. T. TOWLES,
J. G. C. C.

Witness my hand and seal.

Subscribed and sworn to before me by D. T. Towles, March 24, 1898.

[SEAL.] E. M. BLOKEMAN,
Clerk Green County Court.

Interrogatories Addressed to Each of the Plaintiffs.

Interrogatory 1. State your interest, if any, in the bonds and coupons in the pleadings of plaintiffs' mentioned.

Interrogatory 2. How you obtained said interest, and from whom, and if you paid anything for any of said bonds or coupons, state when, the amount and to whom.

Interrogatory 3. In what way do you jointly own or hold any of the bonds or coupons mentioned in the plaintiffs' pleadings with your co-plaintiffs, or any of them?

And on the 25th day of April, 1898, came the plaintiffs herein by Simrall, Bodley & Doolan, their attorneys. On their motion it is ordered that they do have thirty days from this date, within which to file a reply herein.

And on the 13th day of September, 1898, came the plaintiffs by Simrall, Bodley & Doolan, their attorneys and on their motion, it is ordered that time be extended to file reply herein, until October 3, 1898.

26 And on the 3rd day of October, 1898, came the parties by their attorneys. The plaintiffs by their attorneys filed their reply to the answer of the defendant herein.

Came again the plaintiffs by their attorneys and by leave of court filed an amended petition herein.

Came again the plaintiffs by their said attorneys and filed separate answers to the interrogatories annexed to the answer of the defendant.

It is ordered that this case be passed until the 4th inst.

The reply above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS, &c., Plaintiffs,
vs.
COUNTY OF GREEN, &c., Defendants.

Reply and Exhibits.

Par. 1. For reply to the third paragraph of defendant's answer, plaintiffs deny that the order referred to therein was a pretended order, and deny the allegation that said order was not made by the said Green County Court.

They deny the allegation that Thomas R. Barnett was not authorized by law to authorize the clerk of said court to make said subscription. Plaintiffs say that said Thomas R. Barnett was the Judge of said Green County Court, and said subscription was ordered and made by said Green County Court and Thomas R. Barnett, the Judge of said court and they deny that said Barnett merely pretended to authorize the clerk of said court to make said subscription.

All of the said bonds and coupons sued on herein were issued according to law, all of which will appear by various orders of said Green County Court duly certified copies of which are filed herewith as part hereof, marked "Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11."

27 Plaintiffs deny that said subscription was illegally made, and they deny that any of said bonds or coupons were obtained or issued in violation of law, or in disregard of the conditions, or any condition, of subscription; and they deny the allegation that the bonds sued on do not conform to law.

Plaintiffs deny the allegation that no part of the proceeds of any of said bonds or coupons was ever expended in Green County for locating or constructing any part of the Cumberland and Ohio Railroad in said county, and they deny the allegation that the Cumberland and Ohio Railroad never constructed any railroad in Green County.

Plaintiffs deny the allegations that there is no Cumberland and Ohio Railroad, or any other railroad running through Green County, or only four and one fifth miles of railroad in Green County, or that said four and one fifth miles of railroad was built or located or constructed or made by persons other than the Cumberland & Ohio Railroad Company. On the contrary they say that said Cumberland and Ohio Railroad was built through Green County to Greensburg, the county seat of said county, and the proceeds of said bonds and coupons were expended in said Green County for locating and constructing said railroads through said county as aforesaid.

Plaintiffs deny the allegation that any of said bonds or coupons issued or alleged or pretended to have been issued, by any officer or agent of Green County, on account of said alleged subscription, were issued in disregard of the conditions, or any condition of the subscription, or pretended subscription.

Plaintiffs deny that any of said bonds or coupons was or is without any consideration or void.

They deny the allegation that said county was not completely or at all exonerated by said railroad company from the payment of the capital stock by the said county subscription to said Elizabethtown and Tennessee Railroad Company and they say that said county was exonerated from said payment, and said railroad was abandoned and never built, and said subscription of no force or effect whatever.

Plaintiffs deny that said Thomas R. Barnett was ever warned not to deliver said bonds or coupons, and they deny that they, or either of them, or that the Cumberland and Ohio Railroad Company or any one who obtained said bonds or coupons from said Barnett as Judge of the Green County Court had any notice, or knew of any such pretended warning or notice, or of any alleged failure to comply with said conditions or any condition of said subscription by Green County; and they deny that the assignors or transferrers or plaintiffs, or either of them, had and notice or knowledge of the alleged non-performance of said condition, or any condition, or of the claim now made by defendant that the said bonds or any of them, were illegally obtained.

28

Plaintiffs deny that they or any of them, or the Cumberland and Ohio Railroad Company or any assignor of these plaintiffs, ever knew or ever heard of the claim of illegality in said bonds now being for the first time after thirty years asserted by defendants.

Plaintiffs deny the allegations that the plaintiffs are not *bona fide* holders or owners jointly of any of said bonds or coupons for value. They say that they are the joint *bona fide* holders and owners of all of said bonds and coupons for value.

Plaintiffs deny that any of the plaintiffs obtained any of said bonds or coupons after they or any of them were dishonored. They deny that any of said bonds or coupons was illegally executed or without any consideration.

Par. 2. For reply to the fourth paragraph of the answer, plaintiffs deny that any of the bonds or coupons in the petition mentioned were obtained from the defendant, or any one else, by fraud or covin or any misrepresentation of the plaintiff, or any of them, or any one under whom they, or any of them claim; and they deny the allegation that they or any of them are not the *bona fide* holders or owners of said bonds or coupons for value.

Par. 3. For further reply plaintiffs say that the said County of Green subscribed for the capital stock of said Cumberland and Ohio Railroad Company and executed and issued said bonds and coupons in payment for shares thereof, and pursuant to and in accordance with the act of the Legislature of Kentucky authorizing the same, and in accordance with the order of the said Green County Court, approved by a vote of the people and voters of said county.

Plaintiffs further say that the said Green County issued said bonds and coupons according to law and caused them to be placed on the market to be sold, and these plaintiffs and their assignors purchased the same in the ordinary course of business for full value, without any knowledge or notice of any defects either in the exe-

cution or delivery of same, or any defense which existed or was claimed to exist against said bonds that upon the execution, issual and delivery of said bonds and coupons by said Green County to said Cumberland & Ohio Railroad Company there was delivered
29 to and accepted by said Green County the capital stock of said Cumberland & Ohio Railroad Company to the amount of $250,000 and the said capital stock was thereafter voted by said county a number of times on matters vitally affecting the welfare and organization of said railroad company, and said stock is still held by said Green County.

Plaintiffs further say that the said County of Green regularly levied an annual tax to pay the coupons on said bonds for a number of years, and actually paid the same up to the year 18—, and ever since that time the said County of Green through its agents and attorneys, has been negotiating for a settlement of said bonds and coupons by means of compromise, always recognizing the validity of said bonds and coupons until this action was brought, but pleading its inability to pay the same in full.

By reason of the premises the said County of Green is estopped to deny the validity of said bonds and coupons, and the plaintiffs plead and rely upon said estoppel.

Par. 4. For further reply the plaintiffs say that before this suit was brought they or the persons from whom they derived title to all said bonds and coupons, brought several suits in this court against said defendant Green County, on coupons which were attached to said bonds and matured before the coupons sued on herein; and recovered judgment in this court against said Green County on said coupons.

In said suits it was alleged in the petitions that the said County of Green was duly authorized by law to execute said $250,000.00 of bonds with the coupons thereon to pay for a like amount of stock of the said Cumberland & Ohio Railroad Company; that the said County of Green had been duly authorized by law to subscribe for said stock and had done so according to law.

It was further set up in said actions or suits that the said County of Green as authorized by law, had caused the seal of the Commonwealth to be affixed and the names of the judge and clerk of said county court to be signed to said bonds, and the signature of said clerk to be lithographed to said coupons and the same to be issued as it was provided by law that they should be; and that the said bonds and coupons were delivered by said County of Green according to law in payment for said stock as required by law and were sold and disposed of and passed into the hands of various parties, and that the plaintiffs, or the parties from whom they derived their title, were the joint owners of the bonds and coupons sued on herein, as well as the coupons sued on in these actions.

30 In said suits the right and power of Green County, the defendant herein, to issue said bonds and coupons, as well as the fact that they were duly issued and delivered according to law and passed into the hands of plaintiff, or the persons from whom they derived title as *bona fide* purchasers and joint owners, was in-

volved and put in issue, and the issues were the same as made by defendant's answer in this suit; and it was adjudged by this court that said bonds and coupons were issued, executed and delivered according to law and that the plaintiffffs, or the persons from whom they derived their title, are the *bona fide* holders and joint owners of said bonds and coupons and entitled to judgment thereon. The said judgments so rendered stand to day in full force, unreversed, and have never been appealed from, and they determine all the issues raised herein in favor of plaintiffs, and the defendant is concluded by said judgments and thereby estopped to make any defense to said bonds and coupons, and plaintiffs rely upon and plead said judgment in bar of said defense.

The said suits and judgments are referred to and made part hereof as Nos. 5348 & No. —.

Subsequent to said actions and after judgments had been rendered therein against Green County, the plaintiffs in said actions brought suit in this court against said Green County and the judge thereof (No. 5987) for a mandamus to compel them to levy and collect a sufficient tax to pay off the said claims set up therein, and finally obtained judgment therein commanding the levy and collection of said taxes which order has never been obeyed; and in that proceeding it was again set up and alleged that the said bonds and coupons had been legally issued and executed and delivered by said Green Countyt in payment for a like amount of stock of the Cumberland and Ohio Railroad, which was duly delivered to said county and voted by it; and that the said plaintiffs were the *bona fide* holders and joint owners for value of said bonds and coupons, and judgemnt was again rendered therein in favor of plaintiffs, deciding all said issues in their favor by the mandamus which was granted; and the defendant is there concluded and further estopped to set up any defense to said bonds or coupons.

The pleadings, judgment and record in said action No. 5987 are referred to and made part hereof.

The plaintiffs continue to pray as in their original petition and for all proper relief.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Plaintiffs.

31 John G. Simrall says that he is one of the attorneys for the plaintiffs herein, who are all absent from the State of Kentucky, and that the statements of the foregoing reply are true as he believes.

JNO. G. SIMRALL.

Subscribed and sworn to before me by John G. Simrall this 1st day of October, 1898. My commission expires January 27th, 1900.

I. V. CORLEY,
N. P., J. Co., Ky.

Exhibits filed with said reply are as follows:

EXHIBIT 1.

Green County Court, June Term, 1869, June 17th, 1869.

Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the county court of Green County to order an election in the said County of Green, and submit to the qualified voters of said county the question whether said county court shall subscribe for on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company having twenty years to run, and bearing six per cent. interest from date, and payable in the bonds of said county upon conditions that said company shall locate and construct said railroad through the said County of Green and within one mile of the town of Greensburg or said county pay any part of the principle or interest in said county and shall expend the amount so subscribed within the limits of Green County, and also upon the further conditions that said bonds shall not be issued on said amount subscribed to said Cumberland and Ohio Railroad until said County of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court, to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green County at the several voting places in said county be held and con-
32 ducted by the several officers as prescribed by law for holding elections on the 3rd day of July 1869, to vote on the question as to whether or not the said County Court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland and Ohio Railroad conditioned and to be paid as above stated.

EXHIBIT 2.

It is ordered that the following named persons be and they are hereby appointed officers to hold an election on 3rd day of July, 1869, viz: District No. 1, J. Altman & D. Hudson, Judges, E. F. Tucker, Clerk, and W. T. Barnett, Sheriff. District No. 3, B. C. Embry and John Bagby Judges, Geo. Brown, Clerk, and Paschal Pierce Sheriff. District No. 2, Thompson Lowe and S. C. Blake, Judges, Wm. R. Moore, Clerk and Wm. Patrum, Sheriff. District No. 4, Elam Perkins and E. L. Cantrell, Judges, Jesse P. Perkins, Clerk and C. C. Morris, Sheriff. District No. 5, Charles Blevins and Wm. B. Means, Judges, J. H. Skaggs, Clerk and W. M. Scott, Sheriff.

A copy—attest:

P. F. MARSHALL,
Clerk, G. C. C.,
By A. J. PERKINS, *D. C.*

Copies orders Green County Court Ky., in regard to railroad bonds.

Exhibit 3.

Green County Court, June Called Term, 1869, June 17th, 1869.

We the undersigned Commissioners of the Cumberland and Ohio Railroad Company hereby request the County Court of Green County, to submit to a vote of the qualified voters of said county the question whether said court shall subscribe for and on behalf of said county and in pursuance of the provisions of the charter of said railroad company two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said company, payable in the bonds of said county having twenty years to run, and bearing six per cent. interest from date, upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within
33 the limits of Green County, and also upon the further condition that said bonds shall not be issued or said county pay any part of within principal or interest on said amount subscribed as aforesaid until said County of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company.

D. T. TOWLES.
B. W. PENICK.

A copy—attest:

P. F. MARSHALL, *Clerk, G. C. C.*,
By A. J. PERKINS, *D. C.*

Exhibit 4.

Green County Court, June Called Term, 1870, June 3rd, 1870.

Whereas in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in the county of Green on the 3rd day of July 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, now it further appearing that said election was held in conformity with law, and in accordance with the provisions of the charter of said company, now therefore I, Thomas R. Barnett the presiding judge of the Green County Court by virtue of the authority vested in me by law, and to carry out the wishes of said voters do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for an- on behalf of the said County of Green which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with conditions set out in the order of this court ordering said election, and now of record in the office of this court.

EXHIBIT 5.

It is ordered by the court that Drury Hudson be and he is hereauthorized and empowered to vote the stock subscribed by Green County to the Cumberland and Ohio Railroad Company in any meeting of the stockholders of said company.

A copy—attest:

P. F. MARSHALL, *Clerk, G. C. C.,*
By A. J. PERKINS, *D. C.*

34 EXHIBIT 6.

Green County Court, April Term, 1871, April 18th, 1871.

Z. F. Smith, President of the Cumberland and Ohio R. R. Company and D. Hudson director in said county for Green County, this day produced into court a written application to the presiding judge asking said judge to order the issual of two hundred and fifty thousand dollars of the bonds of said county in payment of the subscription of said county to the stock of said company and the court not being sufficiently advised took time till the next term of this court to consider the same.

A copy—attest:

P. F. MARSHALL, *Clerk, G. C. C.,*
By A. J. PERKINS, *D. C.*

EXHIBIT 7.

Green County Court, May Called Term, 1871, May 4th, 1871.

Z. F. Smith, President of the Cumberland and Ohio Railroad Co., &c. on motion to issue bonds for two hundred and fifty thousand dollars stock to said company this motion coming on to be heard and the court not being sufficiently advised this motion is continued.

A copy—attest:

P. F. MARSHALL, *Clerk, G. C. C.,*
By A. J. PERKINS, *D. C.*

EXHIBIT 8.

Green County Court, October Called Term, 1871, Oct. 12th, 1871.

On motion of E. H. Hobson director of the Cumberland and Ohio Railroad it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad be and he is hereby authorized to have printed for the County of Green the bonds to the amount of two hundred and fifty thousand dollars the amount of the subscription of Green County, to the said railroad in the following denominations, to wit the same to be conditioned as specified in the order submitting the vote of the said county.

125 bonds at $1000	$125,000.00
200 bonds at $500	100,000.00
250 bonds at $100	25,000.00
	$250,000.00

A copy—attest:

P. F. MARSHALL, *Clerk, G. C. C.*,
By A. J. PERKINS, *D. C.*

35 EXHIBIT 9.

Green County Court, January Term, 1872, Jan. 16th, 1872.

On motion Cumberland & Ohio R. R. Company it is ordered that the Presiding Judge of Green County issue the bonds of said county for the sum of thirteen hundred dollars said sum being a portion of the stock subscribed for and on behalf of said county to said railroad company said sum being required to pay E. H. Hobson who advanced the money for surveying and locating the road to Greensburg, Ky.

A copy—attest:

P. F. MARSHALL,
Clerk, G. C. C.,
By A. J. PERKINS, *D. C.*

EXHIBIT 10.

Green County Court, Feb. Called Term, 1872, Feb. 9th, 1872.

Application was this day made to the presiding judge of the county court of Green County by the Cumberland & Ohio R. R. Company to issue bonds of said county to the amount of $5,000, the same being a portion of the stock subscribed for and on behalf of said county by the county court of Green County, to said Cumberland and Ohio Railroad and the court being sufficiently advised, it is ordered that the bonds of said county to the amount of $5000 be and the same is hereby ordered to be issued and signed as required by the charter of said Cumberland & Ohio Railroad Company.

A copy—attest:

P. F. MARSHALL,
Clerk, G. C. C.,
By A. J. PERKINS, *D. C.*

EXHIBIT 11.

Green County Court, April Term, 1872, April 15th, 1872.

Application was this day made to the presiding judge of the county court of Green County by president and board of directors of Cumberland and Ohio Railroad Company to issue the balance

of the bonds of said county, to the amount of the subscription of said County of Green to said Cumberland & Ohio Railroad Company and the court being sufficiently advised it is ordered by the
36 court that the balance of said bonds be and are hereby ordered to be issued and signed by the judges of said county court of Green county, and countersigned by the clerk of said court as required by the charter of said company.

A copy—attest:

P. F. MARSHALL,
Clerk, G. C. C.,
By A. J. PERKINS, *D. C.*

Proceedings of the Circuit Court of the United States for the District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall, in the City of Louisville, on Monday, February 21st, A. D., 1887.

No. 5965.

JOHN THOMAS, &c.,
vs.
THE COUNTY OF GREEN.

Be it remembered that heretofore to-wit, on the 2nd day of February, 1887, came the plaintiffs by Simrall & Bodley, their attorneys, and filed in the clerk's office of our said court their petition which is as follows:

Circuit Court of the United States for the 6th Circuit and District of Kentucky.

JOHN THOMAS, WILLIAM MANSUR, JOHN A. KURTZ, MERIDIAN NATIONAL BANK, W. S. HUBBARD, GEORGE B. YANDES, A. R. FORSYTH, INDIANAPOLIS ROLLING MILLS COMPANY, HELEN M. ROCKWOOD, C. B. PARKMAN, the Last Two as Executors of W. O. Rockwood, dec'd; AQUILLA JONES, C. B. PARKMAN, D. RICKETTS, WABASH COLLEGE, R. J. BRIGHT, BRIGG SWIFT, L. W. HASSELMAN, and JOHN THOMAS, Trustee for T. Hendricks, Plaintiffs,
vs.
THE COUNTY OF GREEN, Defendant.

Petition.

The plaintiffs say that the plaintiffs John Thomas, D.
37 Ricketts, George B. Yandes, John A. Kurtz, Helen M. Rockwood and C. B. Parkman, the last two executors of W. O. Rockwood, dec'd., William S. Hubbard, Aquilla Jones, C. B. Parkman, Wm. Mansur, A. R. Forsyth, R. J. Bright, Briggs Swift, L. W. Hasselman and John Thomas, trustee for T. Hendricks, are citizens of and resident and domiciled in the state of Indiana, and that the Wabash College, the Meridian National Bank and the Indianapolis Rolling Mills Co. are corporations, said college and Rolling Mills

Co. are corporations organized under the laws of the State of Indiana, and said bank under an act of Congress of the United States, entitled "An Act" — and now existing in said state and that the defendant the county of Green is a municipal corporation created by the laws of the State of Kentucky and existing in said state.

Plaintiff says further that on the 1st day of April, 1871, the defendant being by law duly authorized so to do did execute bonds to the amount of two hundred and fifty thousand dollars for sums of one thousand five hundred and one hundred dollars each, with interest coupons attached thereto, as hereinafter set forth, to pay for stock in the Cumberland and Ohio Railroad Company, for which the said county had as authorized by law previously subscribed that the county court of said county did as authorized by law cause the seal of the said county to be affixed and the names of the judge and clerk of said county court to be signed to the said bonds, the signature of its said clerk to be lithographed to the said coupons and the same to be iss-ed as it was by law provided that they should be.

Said bonds are payable at the Bank of America in the city of New York, twenty years after the date thereof, and are in all respects alike except as to number and amount.

Said bonds bind the said county to pay at the said Bank of America in the city of New York interest upon the principal sums thereof semi-annually at the rate of six per cent. per annum and said obligation so to pay interest is further evidenced by coupons attached to said bonds for each installment of interest so to be paid, those attached to the $1,000.00 bonds being for $30.00 each; those attached to the $500.00 bonds being for $15.00 each and those attached to the $100.00 bonds being for $3.00 each, and each of said coupons is a complete obligation in itself, is payable to bearer, is capable of being and is intended to pass by delivery as negotiable paper and upon the payment of the interest it is issued for, to be surrendered to said county, and each coupon bears the num-
38 ber of the bond to which it is or was attached.

That the said bonds and coupons were delivered by the said county in payment for said stock as required by law and have been sold and disposed of and have passed into the hands of various parties unknown to plaintiffs except that the plaintiffs are the joint owners of the following of the said bonds, that is to say of said bonds for one thousand dollars, each, those numbered as follows: 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 and 120, and of said bonds for five hundred dollars each those numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, and of said bonds for one hundred dollars each those numbered as follows: 129, 195, 199, 22-, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250.

They are also the joint holders and owners of coupons which are now due, severed from the said bonds as follows, that is to say of coupons which became due on the 1st day of October, 1882, coupons for $30.00 each, severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113,

114, 115, 116, 117, 118, 119, and 120 amounting to $840.00, coupons for $15.00 each, severed from bonds numbered as follows, 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, amounting to $330.00 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250, amounting to $42.00.

Of coupons which became due on the 1st day of April, 1883, coupons for $30.00 each, severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 and 120, amounting to $840, coupons for $15.00 each, severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195 and 196, amounting to $330.00 and coupons for $3.00 each, severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247, and 250, amounting to $42.00. Of coupons which became due on the 1st day of October, 1883; coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120, amounting to $840.00 coupons for $15.00
39 severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195 and 196, amounting to $330 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250, amounting to $42.00. Of coupons which became due on the 1st day of April 1884; coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120 amounting to $840.00, coupons for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, amounting to $330.00 and coupons for $3.00 each, severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250, amounting to $42.00. Of coupons which became due on the 1st day of October, 1884; coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120 amounting to $840.00, coupons for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, amounting to $330.00 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250, amounting to $42.00 of coupons which became due on the first day of April, 1885, coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 and 120, amounting to $840.00 coupons for $15.00 each, severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179,

180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, amounting to $330.00 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247, and 250, amounting to $42.00. Of coupons which became due on the 1st day of October, 1885, coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120, amounting to $840.00 coupons for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting to $330.00 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247, and 250, amounting to $42.00 of coupons which became due on the 1st day of April 1886, coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120, amounting to $840, and coupons for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, and 196, amounting to $330.00 and coupons for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247, and 250, amounting to $42.00 of coupons which became due on the 1st day of October, 1886, coupons for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, and 120, amounting to $840.00 coupons for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195 and 196 amounting to $330.00 and coupons for $3.00 each, severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 243, 244, 247 and 250, amounting to $42.00 the whole of said coupons amounting to $10,908.00 and all of them herewith filed as part hereof.

Plaintiffs say that the defendant is indebted to them in the sum of ten thousand nine hundred and eight dollars with interest on twelve hundred and twelve dollars, thereof, from the 1st day of October, 1882, until paid, and on twelve hundred and twelve dollars thereof from the 1st day of April, 1883, until paid, and on twelve hundred and twelve dollars thereof from the 1st day of October, 1883, until paid and on twelve hundred and twelve dollars thereof, from the 1st day of April, 1884, until paid, and on twelve hundred and twelve dollars thereof from the 1st day of October, 1884, until paid, and on twelve hundred and twelve dollars thereof from the 1st day of April, 1885, until paid, and on twelve hundred and twelve dollars thereof from the 1st day of October, 1885, until paid and on twelve hundred and twelve dollars thereof from the 1st day of April, 1886, until paid and on twelve hundred and twelve dollars thereof from the 1st day of October, 1886, until paid. That no part of said debt or interest has ever been paid although payment thereof was

duly demanded by plaintiffs of defendant of said coupons as
41 they severally became due and payable and the whole of said debt and interest is due and unpaid.

Wherefore plaintiffs pray judgment against said defendant for their said debts and interest and costs herein and for all proper relief.

SIMRALL & BODLEY,
Attorneys for Plffs.

STATE OF KENTUCKY, *Jefferson County, sct:*

The affiant, Temple Bodley, says he is attorney for plaintiffs in this action that plaintiffs are all absent from the state of Kentucky, and that the statements of the foregoing petition are true as he believes.

TEMPLE BODLEY.

Subscribed and sworn to by said Temple Bodley, before me this 2nd day of Feby., 1887.

F. W. MORANCY,
Notary Public for Jeff. Co., Ky.

Upon which there issued the following summons:

The President of the United States of America to the Marshal of the Kentucky District, Greeting:

You are commanded to summon the County of Green, State of Kentucky, to answer on the first day of the next February term of the Circuit Court of the United States for the District of Kentucky, to be held at the city of Louisville, a petition against it, in said court by John Thomas, *et al.*, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States at Louisville, in the said district, this 2nd day of February, in the year of our Lord, 1887, and of our Independence the 111th.

SAM'L B. CRAIL,
C. C. C., K. D.,
By HENRY F. CASSIN, *Deputy.*

Upon which the marshal made the following return:

I hereby appoint Wm. B. Wilson for Special Bailiff to execute the within summons.

A. J. GROSS,
U. S. M., Ky.

42 Executed the within summons on Green Co., Ky., by delivering a true copy thereof to D. T. Towles the presiding Judge of Green Co., February 4th, 1887.

A. J. GROSS, U. S. M., Ky.,
By WM. B. WILSON, JR., *B. L.*

Subscribed and sworn to before me this 21st Feb., 1887.

S. B. CRAIL,
U. S. Clerk.

The affiant Wm. B. Wilson, Jr., Special Bailiff to execute this summons, states that his return and endorsement made hereon is true. That he is over 21 years of age and that he is not a party to nor interested in this action.

WM. B. WILSON, JR.

Subscribed and sworn to before me by Wm. B. Wilson, Jr., this 21st day of Feb., 1887.

SAM'L B. CRAIL, *Clerk.*

And at a term of our said court held for its February term, 1887, to-wit: Monday, February 21st, A. D., 1887.

Came the plaintiffs by Simrall & Bodley, their attorneys and the defendant though solemnly called came not but made default. It is therefore considered by the court that the plaintiffs John Thomas, William Mansur, John A. Kurtz, Meridian National Bank, W. S. Hubbard, George B. Yandes, A. R. Forsyth, Indianapolis Rolling Mills Company, Helen M. Rockwood, and C. B. Parkman, executors of W. O. Rockwood, dec'd, Aquilla Jones, C. B. Parkman, D. Ricketts, Wabash College, R. J. Bright, Briggs Swift, L. W. Hasselman and John Thomas Trustee for T. Hendricks, recover of the defendant the County of Green, the sum of twelve thousand four hundred and seventy-one and 48-100 dollars the debt in the petition demanded with interest thereon, at the rate of six per cent. per annum from the 21st day of February, 1887, until paid. Also their costs herein expended.

Proceedings of the Circuit Court of the United States for the District of Kentucky.

At a regular term begun and held at the Federal Court Hall in the City of Louisville on Monday, October 4th, A. D. 1886.

43 Present: Hon. John W. Barr, sitting as Circuit Judge.

No. 5348.

JOHN THOMAS & Others
vs.
COUNTY OF GREEN.

Be it remembered, that heretofore to-wit, on the 28th day of September, 1882, came the plaintiffs by Simrall & Bodley, their attorneys and filed in the clerk's office of our said court, their petition which petition is as follows:

Circuit Court of the United States for the District of Kentucky.

JOHN THOMAS, DILLARD RICKETTS, GEORGE B. YANDES, JOHN A. KURTZ, HELEN M. ROCKWOOD and C. B. PARKMAN, the Last Two Persons as Executors of W. O. Rockwood, Dec'd; WILLIAM S. HUBBARD, AQUILLA JONES, C. B. PARKMAN, THOMAS A. HENDRICKS, WABASH COLLEGE, INDIANAPOLIS ROLLING MILLS COMPANY, WILLIAM MANSUR, MERIDIAN NATIONAL BANK, A. R. FORSYTH, J. N. KINNEY, R. J. BRIGHT, BRIGG SWIFT, L. W. HASSELMAN, Plaintiffs,

vs.

THE COUNTY OF GREEN, Defendant.

Petition.

The plaintiffs say that the plaintiffs, John Thomas, Dillard Rickertts, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wm. Mansur, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift and L. W. Hasselman, are citizens — and resident and domiciled *of* the state of Indiana and that the Wabash College, the Meridian National Bank, and the Indianapolis Rolling Mills Company, organized under the laws of the state of Indiana, and said bank under Act of Congress of the United States, entitled an act — and now existing in said state, and that the defendant the County
44 of Green is a municipal corporation, created by the laws of the State of Kentucky and existing in said state. That on the first day of April, 1871, the defendant being by law duly authorized so to do, did execute bonds to the amount of two hundred and fifty thousand dollars for sums of one thousand, five hundred and one hundred dollars each, with interest coupons attached thereto as hereinafter set forth to pay for stock in the Cumberland and Ohio Railroad Company for which the said county had, as authorized by law, previously, subscribed. That the county court of said county did as authorized by law, cause the seal of the said county to be affixed and the names of the judge and clerk of said county court to be signed to the said bonds, the signature of its said clerk to be lithographed to said coupons, and the same to be issued as it was by law provided that they should be. Said bonds are payable at the Bank of America, in the city of New York, twenty years after the date thereof, and are in all respects alike except as to number and amount. Said bonds bind the said county to pay at the said Bank of America in the said city of New York, interest upon the principal sums thereof semi-annually at the rate of six per cent. per annum, and said obligation so to pay interest is further evidenced by coupons attached to said bonds for each installment of interest so to be paid, those attached to the $1000.00 bonds being for $30.00 each, those attached to the $500.00 bonds being for $15.00 and those attached to the $100.00 bonds being for $3.00 each and each of said coupons

is a complete obligation in itself, is payable to bearer, is capable of being and is intended to be separated from its bond, to pass by delivery as negotiable paper and upon the payment of the interest it is issued for, to be surrendered to said county each coupon bears the number of the bond to which it is or was attached.

That the said bonds and coupons were delivered by the said county in payment for said stock as required by law and have been sold and disposed of and have passed into the hands of various parties unknown to plaintiffs except ——. That the plaintiffs are the joint owners of the following of the said bonds, that is to say, of those of the bonds for one thousand dollars ($1,000.00) each numbered as follows: 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120; and of the bonds for five hundred dollars ($500) each numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 250. They are also the joint holders and owners of coupons which are now due *severed* from the said —— as follows, that is to say, of coupons which became due on the 1st day of April, 1880, for $30.00 each, severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, amounting to $840.00. For $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting in all to $330.00. And for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 250, amounting in all to $51.00. Of coupons which became due on the 1st day of Oct., 1880 for $30 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, amounting to $840.00, for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting in all to $330.00. And for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 250, amounting in all to $51.00. Of coupons which became due on the 1st day of April, 1881, for $30.00 each, severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, amounting to $840.00, for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting in all to $330.00, and for $3.00 each severed from bonds numbered as follows, 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 250, amounting in all to $51.00; of coupons which became due on the 1st day of October, 1881, for $30.00 each severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, amounting to $840, for $15.00 each severed from bonds numbered as

follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting in all to $330.00, and for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 250, amounting in all to $51.00; of coupons which became due on the 1st day of April, 1882, for $30.00 each
46 severed from bonds numbered 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, amounting to $840.00, for $15.00 each severed from bonds numbered as follows: 161, 169, 170, 171, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, amounting in all to $330.00, and for $3.00 each severed from bonds numbered as follows: 129, 195, 199, 223, 224, 238, 239, 240, 241, 242, 244, 247, 250, amounting in all to $42.00. Of coupons which became due on the 1st day of April, 1878, for $30.00 severed from bond numbered 118; of coupon which became due on October 1st, 1879, for $30.00, severed from bond numbered 118; of coupon which became due on the 1st day of April, 1878 for $30.00 severed from boiid numbered 94; of coupon which became due on the 1st day of October, 1878 for $30.00 severed from bond numbered 94; of coupon which became due on the 1st day of April, 1879, for $30.00 severed from bond numbered 94; of coupon which became due on the 1st day of October, 1879, for $30.00 severed from bond numbered 94; of coupon which became due on the 1st day of April, 1878 for $15.00 severed from bond numbered 191, of coupon which became due on the 1st day of October, 1878 for $15.00, severed from bond numbered 191; of coupon which became due on the 1st day of April, 1879, for $15.00 severed from bond numbered 191, of coupon which became due on the 1st day of October, 1879, for $15.00 severed from bond numbered 191, and the whole of said coupons amounting to $6,336.00, all of which are herewith filed as part hereof.

Plaintiff- says that the defendant is indebted to them in the sum of six thousand three hundred and thirty-six dollars, with interest on seventy-five dollars thereof from the 1st day of April, 1878, until paid; on forty-five dollars thereof from the 1st day of October, 1878, until paid; on forty-five dollars thereof from the 1st day of April, 1879, until paid; on seventy-five dollars thereof from the 1st day of October, 1879, until paid; on one thousand, two hundred and twenty-one dollars thereof from the 1st day of April, 1880, until paid; on one thousand two hundred and twenty-one dollars thereof from the 1st day of October, 1880, until paid; on one thousand two hundred and twenty-one dollars thereof from the 1st day of April, 1881, until paid; on one thousand two hundred and twenty-one dollars thereof from the 1st day of October, 1881 until paid; on one thousand two hundred and twelve dollars thereof, from the 1st day of April, 1882, until paid.

47 That no part of said debt or interest has been paid, although payment was duly demanded by plaintiffs of defendant of said coupons as they severally became due and payable, and the whole of said debt and interest is due and unpaid. Wherefore,

plaintiffs pray judgment against defendant for their said debt and interest and costs herein, and all proper general relief.

SIMRALL & BODLEY,
Attorneys for Plaintiffs.

Temple Bodley says he is attorney for plaintiffs in the foregoing petition, the statements of which are true and that plaintiffs are all absent from this State of Kentucky, as affiant believes.

TEMPLE BODLEY.

Subscribed and sworn to before me by Temple Bodley this 28th day of September, 1882.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Upon which petition there issued the following process:

The President of the United States of America to the Marshal of the Kentucky District, Greeting:

You are commanded to summon the county of Green to answer on the first day of the next February term of the Circuit Court of the United States for the District of Kentucky, to be held at the city of Louisville, a petition against it in said court by John Thomas and others, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said District, this 28th day of Sept. in the year of our Lord 1882, and of our independence the 107th.

SAM'L B. CRAIL,
C. C. C., K. D.,
By HENRY F. CASSIN, *Deputy.*

Upon which process the marshal made the following return:

H. C. Altman is appointed special bailiff to execute this summons, Sept. 28th, 1882.

A. J. AUXIER, *U. S. M.*,
By J. L. FAIRLEIGH, *D. M.*

Executed this summons on the within named defendant,
48 the County of Green, by delivering a copy thereof to David D. Toals, the County Judge of said Green County, at Greensburg, this 30th day of Sept., 1882.

H. C. ALTMAN,
Spl. Bailiff.
For A. J. AUXIER, *U. S. M.*

The foregoing return subscribed and sworn to before me by H. C. Altman, the special bailiff who is well known to me, this 30th day of Sept., 1882.

A. J. PERKINS,
Clerk Green County Court.

And at a term of our said court held for its February term 1887, to-wit, Tuesday, February 8th, A. D., 1887.

Came the plaintiffs by Messrs. Simrall & Bodley, their attorneys, and on their motion and it appearing to the court that the defendant has been duly served with process herein, as appears from the marshal's return thereon, and the defendant though solemnly called came not but made default, it is therefore considered by the court that the plaintiffs, John Thomas, Dillard Ricketts, George B. Yandes, John A. Kurtz, Helen M. Rockwood and C. B. Parkman, executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis, Rolling Mill Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift and L. W. Hasselman, recover of the defendant, the County of Green, the sum of eight thousand five hundred and ninety-three and 82-100 dollars, the debt in the petition demanded, with interest thereon at the rate of six per cent. per annum from the 8th day of February, 1887, until paid, also their costs herein expended.

The amended petition above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS, ETC., Plaintiff,
vs.
THE COUNTY OF GREEN, Defendant.

49 *Amended Petition.*

The plaintiffs by their attorneys came and by leave of court amend their petition herein, and state that within twelve months last past the plaintiffs, John Thomas, L. W. Hasselman and Harriet Jones have died.

The said John Thomas died testate domiciled in Marion county Indiana, and by the terms of his last will, which was duly admitted to probate in the Marion Circuit, Marion County Indiana Court, which was and is a court of competent jurisdiction and the proper court of probate for said county, he appointed Henry Knippenberg his executor. Said Knippenberg duly qualified as such executor by taking the oath and giving the bond required of him by law, and letters of administration upon said estate were issued to him by the said court. A copy of said letter, duly certified according to

Act of Congress, is herewith filed as part hereof, marked "J. T. No. 1."

By the terms of the will of said John Thomas the undivided interest which said Thomas held in the bonds and coupons sued on herein passed to and vested in the said Knippenberg as executor of John Thomas, who is now made a party plaintiff herein and substituted as plaintiff in lieu of John Thomas, deceased.

Said Henry Knippenberg is a citizen and resident of the state of Indiana.

Said L. W. Hasselman died intestate domiciled in Marion County Indiana, and in Marion Circuit Court of Marion County, Indiana, which was in a proper court of competent jurisdiction for that purpose, Elizabeth W. Hasselman was appointed administratrix of said L. W. Hasselman, deceased, and duly qualified as such administratrix by taking the oath and giving bond required by law, whereupon letters of administration upon the estate of L. W. Hasselman, deceased, were duly issued to her and a copy of said letters duly certified as required by act of Congress, are herewith filed as part hereof, marked "E. W. H., No. 1."

Said Elizabeth W. Hasselman is a citizen and resident of the State of Indiana, and, ever since her appointment and qualification aforesaid, has continued to act and is now acting as administratrix, of L. W. Hasselman, deceased, and as such administratrix is now the owner of the undivided interest which L. W. Hasselman her intestate, formerly owned in the bonds and coupons herein sued on; and in her capacity as administratrix aforesaid she is now made a party to this suit in lieu of L. W. Hasselman, deceased.

50 The plaintiff, Harriet Jones, died a widow, testate, domiciled in Marion county, Indiana, and by the terms of her last will, which was duly probated in the proper court of probate for said county, she devised and bequeathed all of her undivided interest in the bonds and coupons sued upon in this action in the following named persons, who are her children and her sole legatees and devisees, namely, Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones, and Emma J. Holloway, (the last named being a widow) who are all of full age and under the laws of the state of Indiana, are the only heirs at law and distributees of their said mother Harriet Jones.

Said Harriet Jones, deceased, left no other children and non-issue of any other children, and her estate has been fully settled up and all claims of creditors against the same have been fully paid off and discharged and the accounts of her personal representative have been settled and the said personal representative has been finally discharged from his trust, and the undivided interest which said Harriet Jones held jointly with the other plaintiffs herein in and to the bonds and coupons sued on — this action passed under the law of the state of Indiana and by the will of said Harriet Jones to and vested in her children above named, and they now own the undivided interest of said Harriet Jones in their own right

and sue herein in their own right as joint owners of said undivided interest in the bonds and coupons herein sued on.

The said Emma J. Holloway is a citizen and resident of the state of California, and the said Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones and Frederick Jones are all residents and citizens of Indiana, and all are now made plaintiffs herein in lieu of Harriet Jones deceased.

Plaintiffs further say that by mistake in the original petition the name of Helen R. Edson is incorrectly written Helm R. Edson, and plaintiffs now by leave of court make this correction in the name of said Helen R. Edson, both in the caption and in the body of the original petition as amended.

Plaintiffs further say that by mistake in the original petition the name of J. A. Kurtz is incorrectly written J. H. Kurtz, both in the caption and in the body of the original petition as amended.

51 Plaintiffs say that the bonds and coupons sued on in this action as shown by the original petition herein and the amendments thereto, are now owned jointly by the following named persons who are all made parties plaintiff to this action and who have an undivided interest in all of the bonds and coupons sued on, namely, Henry Knippenberg, executor of John Thomas deceased, Elizabeth W. Hasselman, administratrix of L. W. Hasselman, deceased, Maria D. Leach, Sherley D. Murphy, Jessie D. Wood, Helen R. Edson, W. E. Rockwood, Charles B. Rockwood, Eliza C. Hendricks, Mrs. R. K. Lord, Wabash College, Meridian National Bank, Hannah A. Mansur, Charles W. Mansur, William S. Hubbard, George B. Yandes, E. R. Forsythe, Indianapolis Rolling Mill Company, J. N. Kinney, R. J. Bright, J. A. Kurtz, J. C. Thoms, and H. L. Breneman (the last two as executors of Briggs Swift, deceased) Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones and Emma J. Holloway (the last nine being the children of Harriet Jones, deceased.)

Wherefore, plaintiffs pray that this action be revived so far as necessary or proper in the names of the representatives of John Thomas, L. W. Hasselman and Harriet Jones as herein set forth and they pray judgment in favor of the parties plaintiff as hereinbefore named in this amended petition against the County of Green in the various sums named in the original petition as amended; and they pray for their costs expended and for all other and further relief, equitable general and special.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Plaintiffs.

John G. Simrall says that he is one of the attorneys for the plaintiffs herein, who are all absent from the State of Kentucky, and that the statements contained in the foregoing amended petition are true as he believes.

JNO. G. SIMRALL.

Subscribed and sworn to before me by John G. Simrall, this 3rd day of October, 1898.

I. V. CORLEY,
N. P., J. Co., Ky.

My commission expires January 27th, 1900.

EXHIBIT J. T., No. 1.

STATE OF INDIANA, *Marion County, set:*

To whom these presents shall come, Greeting:

I, James W. Fesler, clerk of the Marion County Court
52 within and for said county and state, do hereby certify that the last will and testament of John Thomas deceased, late of said county, has been duly admitted to probate and record in said court, and Henry Knippenberg having given bond and duly qualified as executor, is duly authorized and empowered to take upon himself the administration of said estate according to law, and the terms of such will.

Witness my hand and the seal of said court, at the city of Indianapolis, Indiana, this 28th day of January, 1898.

[SEAL.] JAMES W. FESLER, *Clerk.*

STATE OF INDIANA, *Marion County, set:*

I, James W. Fesler, Clerk of the Circuit Court within and for said county and state, the same being a court of record, and having within the county aforesaid exclusive probate jurisdiction, do hereby certify the foregoing to be a true and complete copy of the letters granted and issued to Henry Knippenberg on the personal estate of John Thomas, late of said county, deceased, and that said letters are still in force, and all the legal acts of said executor are entitled to full faith and credit, as fully appears from the records of said court in my custody as such clerk, and on file in my office.

In testimony whereof, I hereunto affix the seal of said court and subscribe my name, at the city of Indianapolis, Indiana, this 28th day of September, 1898.

[SEAL.] JAMES W. FESLER, *Clerk.*

STATE OF INDIANA, *Marion County, set:*

I, Henry Clay Allen, sole judge of the Marion Circuit Court of Marion County, and Judge of the Nineteenth Judicial Circuit of the State of Indiana, do hereby certify that Marion County, in the State of Indiana, constitutes the said Nineteenth Judicial Circuit of said state, and that the foregoing attestation and certificate of James W. Fesler, is in due form of law, and that the said James W. Fesler is and at the time of making of said certificate and attestation was the clerk of said Marion Circuit Court of Marion County, in the said state, and is and at the same time was, the proper officer to make

such attestation and certificate, and that his signature thereto
53 is genuine, and that as such clerk he is the sole custodian of the papers, documents, records and seal pertaining to said court.

Witness my hand and the seal of said court affixed at the city of Indianapolis, Indiana, this 28th day of September, 1898.

[SEAL.] HENRY CLAY ALLEN,
Judge of the Marion Circuit Court of Marion County, Indiana, Being the 19th Judicial Circuit of said State.

STATE OF INDIANA, *Marion County, ss:*

I, James W. Fesler, clerk of the Marion Circuit Court of Marion County, in the state of Indiana, said county constituting the Nineteenth Judicial Circuit of said state, do certify that Henry Clay Allen whose signature appears to the foregoing certificate is and was at the time of signing said certificate, the sole Judge of said Court, duly commissioned and qualified in accordance with the laws of the state of Indiana.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Indianapolis, Indiana, this 28th day of Sept., 1898.

[SEAL.] JAMES W. FESLER,
Clerk of the Marion Circuit Court of Marion County, Indiana.

EXHIBIT E. W. H., No. 1.

Letter- of Administration.

STATE OF INDIANA, *Marion County, set:*

To whom these presents shall come, Greeting:

I, James W. Fesler, Clerk of the Marion Circuit Court, for the County of Marion in the State of Indiana, do hereby certify that administration of the personal property of Lewis W. Hasselman late of Marion County, deceased who died intestate is granted to Elizabeth W. Hasselman and she having qualified and given bond as such administratrix, is duly authorized to take upon herself the administration of such estate according to law.

Witness my hand and seal of said court at Indianapolis, Indiana this 27th day of September, 1898.

54 [SEAL.] JAMES W. FESLER, *Clerk.*

STATE OF INDIANA, *Marion County, set:*

I, James W. Fesler, clerk of the Circuit Court within and for said county and state, the same being a court of *of* record, and having within the county aforesaid exclusive probate jurisdiction, do hereby certify the foregoing to be a true and complete copy of the letters of administration granted and issued to Elizabeth W. Hasselman on the personal estate of Lewis W. Hasselman, late of said county,

deceased, and that said letters are still in force, and all the legal acts of said administratrix are entitled to full faith and credit, as fully appears from the records of said court in my custody as such clerk, and on file in my office.

In witness whereof, I hereunto affix the seal of said court, and subscribe my name, at the city of Indianapolis, Indiana, this 28th day of September, 1898.

[SEAL.] JAMES W. FESLER, *Clerk.*

STATE OF INDIANA, *Marion County, ss:*

I, Henry Clay Allen, sole judge of the Marion Circuit Court of Marion County, and Judge of the Nineteenth Judicial Circuit of the State of Indiana, do hereby certify that Marion County, in the State of Indiana, constitutes the said Nineteenth Judicial Circuit of said state, and that the foregoing attestation and certificate of James W. Fesler, clerk is in due form of law, and that the said James W. Fesler is and at the time of making of said certificate and attestation was the clerk of said Marion Circuit Court of Marion County, in the said state, and is and at the same time was, the proper officer to make such attestation and certificate and that his signature thereto is genuine and that as such clerk he is the sole custodian of the papers, documents, records and seal pertaining to said court.

Witness my hand and the seal of said court affixed at the city of Indianapolis, Indiana, this 28th day of September, 1898.

[SEAL.] HENRY CLAY ALLEN,
Judge of the Marion Circuit Court of Marion County, Indiana, Being the 19th Judicial Circuit of said State.

55 STATE OF INDIANA, *Marion County, ss:*

I, James W. Fesler, clerk of the Marion Circuit Court of Marion County, in the state of Indiana, said county constituting the Nineteenth Judicial Circuit of said state, do certify that Henry Clay Allen whose signature appears to the foregoing certificate is and was at the time of signing said certificate, the sole Judge of said Court, duly commissioned and qualified in accordance with the laws of the state of Indiana.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of Indianapolis, Indiana, this 28th day of Sept. 1898.

[SEAL.] JAMES W. FESLER,
Clerk of the Marion Circuit Court of Marion County, Indiana.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Geo. B. Yandes.

The affiant and plaintiff George B. Yandes, in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That his interest is an undivided interest in all the bonds sued on herein in the proportion that fifteen hundred dollars with interest thereon, bears to all the other bonds sued on herein.

2. That the plaintiff and affiant was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; and said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

56 3. This interrogatory is fully answered in my answer to the second.

GEO. B. YANDES.

Subscribed and sworn to before me this 26th day of September, 1898.

[SEAL.] JAMES A. HAMILTON,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Elicha P. Jones.

The affiant and plaintiff Elisha P. Jones, in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteenth hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished

by said company to be used in building the Cumberland and Ohio Railroad through Green County Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement the father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died, leaving a will, under the terms of which I, became as one of her legatees, the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

57 3. This interrogatory is fully answered in my answer to the second interrogatory.

ELICHA P. JONES.

Subscribed and sworn to before me this 28th day of September, 1898.

D. LANE,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to William M. Jones.

The affiant and plaintiff William M. Jones in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died, leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided

one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

58 3. This interrogatory is fully answered in my answer to the second interrogatory.

WM. M. JONES.

Subscribed and sworn to before me this 28th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Cora Jones.

Affiant and plaintiff, Cora Jones in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That her interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest bears to all the other bonds sued on herein.

2. That plaintiff's father-in-law Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father-in-law died leaving a will under the terms of which my mother-in-law, Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother-in-law has since died, leaving a will, under the terms of which I, became as one of her legatees, the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father-in-law in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

CORA JONES.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

59 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Complainants,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to J. C. Thoms and H. L. Breneman, as Executors of Briggs Swift, Deceased.

The affiant and plaintiff J. C. Thoms in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That he is one of the executors of the will of Briggs Swift, deceased, and his testator's interest is an undivided interest in all the bonds sued on herein in the proportion that one thousand dollars with interest thereon, bears to all the other bonds sued on.

2. Said Swift was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; and said bonds were turned over to said stockholders as dividends on their stock and by agreement between said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

3. This interrogatory is fully answered in my answer to the second.

J. C. THOMS.

STATE OF OHIO, *County of Hamilton:*

J. C. Thoms, being first duly sworn deposes and says that the answer to the foregoing interrogatories are true as he verily believes.

Sworn to before me this 24th day of Sept., 1898.

[SEAL.] WM W. RAMSEY,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

60 *Answers to Interrogatories Addressed to Wm. S. Hubbard.*

This affiant and plaintiff in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in all the bonds sued on herein in the proportion that one thousand dollars with interest thereon, bears to all the other bonds sued on herein.

2. That said Hubbard was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; and said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein.

3. This interrogatory is fully answered in my answer to the second.

WILLIAM S. HUBBARD.

Subscribed and sworn to before me this 26th day of September, 1898.

[SEAL.] LUCIUS B. SAMFT,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Aquilla Q. Jones.

The affiant and plaintiff, Aquilla Q. Jones in answer to three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the
61 stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

AQUILLA Q. JONES.

Subscribed and sworn to before me this 26th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answer to Interrogatories Addressed to Edwin S. Jones.

The affiant and plaintiff, Edwin S. Jones in answer to three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the
62 said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

EDWIN S. JONES.

Subscribed and sworn to before me this 27 day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Emma J. Holloway.

The affiant and plaintiff, Emma J. Holloway in answer to three interrogatories annexed to the answer of defendant herein says:

1. That her interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dolars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and
63 Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fuly answered in my answer to the second interrogatory.

AQUILLA Q. JONES.

STATE OF INDIANA, *County of Marion, ss:*

Aquilla Q. Jones of lawful age being duly sworn says that he is the agent and attorney of Emma J. Holloway, one of the plaintiffs in the above entitled action; that he has read the foregoing interrogatories propounded to Emma J. Holloway, in said cause, and he makes this affidavit for and on behalf of said Emma J. Holloway and says that the foregoing answers to the interrogatories to said Emma J. Holloway in said cause are true.

AQUILLA Q. JONES.

Subscribed and sworn to before me this 28th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Frederick Jones.

The affiant and plaintiff, Frederick Jones in answer to the three interrogatories annexed to the answer of defendant herein says:

64 1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

FREDERICK JONES.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] R. D. KNOWLES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Benjamin F. Jones.

The affiant and plaintiff, Benjamin F. Jones in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the
65 bonds sued upon herein in the proportion that one-ninth of fourteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

BENJAMIN F. JONES.

Subscribed and sworn to before me this 26th day of September, 1898.

[SEAL.] IDA J. AYRES.
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers and *Interrogatories Addressed to John W. Jones.*

The affiant and plaintiff, John W. Jones in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds

sued upon herein in the proportion that one-ninth of fourteen hundred dollars, bears to all the other bonds sued on herein.

66 2. That plaintiff's father, Aquilla Jones was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died leaving a will under the terms of which my mother Harriet Jones, became the owner of his interest in said bonds as his sole legatee and devisee. My mother has since died leaving a will under the terms of which I became as one of her legatees the owner of an undivided one-ninth interest of the fourteen hundred dollar interest owned by my father in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

JOHN W. JONES.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] IDA J. AYRES.
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to William E. Rockwood.

The affiant and plaintiff, William E. Rockwood in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-third of fifty-three hundred dollars and interest bears to all the other bonds sued on herein.

2. That plaintiff's father William O. Rockwood, was one of the stockholders in the Indianapolis Rolling Mill Company and

67 that the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died without a will and leaving his interest in said bonds by inheritance to my mother Helen M. Rockwood, and his children William E. Rockwood, Helen R. Edson and Charles B. Rockwood. Subsequently my mother died without will leaving her interest in said bonds by inheritance in said children above named who now own such interest.

3. This interrogatory is fully answered in my answer to the second interrogatory.

WILLIAM E. ROCKWOOD.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Helen R. Edson.

The affiant and plaintiff, Helen R. Edson in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That her interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-third of fifty-three hundred dollars and interest bears to all the other bonds sued on herein.

2. That plaintiff's father, William O. Rockwood, was one of the stockholders in the Indianapolis Rolling Mill Company and that the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cum-
68 berland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my father died without a will and leaving his interest in said bonds by inheritance to my mother, Helen M. Rockwood, and his children, William E. Rockwood, Helen R. Edson and Charles B. Rockwood. Subsequently my mother died without will leaving her interest in said bonds by inheritance in said children above named who now own such interest.

3. This interrogatory is fully answered in my answer to the second interrogatory.

HELEN R. EDSON.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] SELDON S. BROWN,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Jessie D. Wood.

The affiant and plaintiff, Jessie D. Wood in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That her interest is an undivided interest in and to the bonds sued on herein in the proportion that one-half of sixty-six hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's uncle Dillard C. Ricketts was one of the stockholders in the Indianapolis Rolling Mill Company, and that the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and
69 said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement Dillard C. Ricketts died leaving his interest in said bonds to his widow, Indiana C. Ricketts as sole legatee. Subsequently Indiana C. Ricketts died, leaving her interest in said bonds by her last will and testament to this plaintiff and Shirley D. Moore as her legatees.

3. This interrogatory is fully answered in my answer to the second interrogatory.

JESSIE D. WOOD,
By J. W. MURPHY, *Ag't.*

STATE OF INDIANA, *County of Marion, ss:*

John W. Murphy of lawful age being duly sworn says that he is the agent of Jessie D. Wood, one of the plaintiffs in the above entitled action; that he has read the foregoing interrogatories propounded to Jessie D. Wood in said cause, and he makes this affidavit for and on behalf of said Jessie D. Wood, and says that the foregoing answers to the interrogatories propounded to said Jesse D. Wood in this cause are true. J. W. MURPHY.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] CHAS. H. SMITH,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Shirley D. Murphy.

The affiant and plaintiff, Shirley D. Murphy in answer to the three interrogatories annexed to the answer of defendant herein says:

70 1. That her interest is an undivided interest in and to the bonds sued on herein in the proportion that one-half of sixty-six hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's uncle, Dillard C. Ricketts was one of the stockholders in the Indianapolis Rolling Mill Company, and that the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement Dillard C. Ricketts died leaving his interest in said bonds to his widow, Indiana C. Ricketts as sole legatee. Subsequently Indiana C. Ricketts died, leaving her interest in said bonds by her last will and testament to this plaintiff and Jesse D. Wood as her legatees.

3. This interrogatory is fully answered in my answer to the second interrogatory.

SHIRLEY D. MURPHY.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] CHAS. H. SMITH,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to John A. Kurtz.

The affiant and plaintiff, John A. Kurtz, in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That his interest is an undivided interest in all of the bonds

sued on herein in the proportion that five hundred dollars with interest thereon bears to all the other bonds sued on herein.

71 2. I obtained my interest from the Second Presbyterian Church, Mission of Indianapolis, Indiana, to which a five hundred dollar bond of said Green County, Kentucky was left by the will of one L. F. Peck. Said Peck was one of the stockholders in the Indianapolis Rolling Mill Company and the said Green County bonds were taken by said company in payment for iron furnished by it to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; that said bond was turned over to said stockholders as dividends on their stock. Mr. Peck received a portion of said bonds as a dividend on his stock in said Indianapolis Rolling Mill Company. Thereafter he died leaving a five hundred dollar bond as above stated to said Second Presbyterian Church Mission. I purchased said bond and paid therefore the sum of $500.00 in cash and paid the same to said Mission prior to December, 1879.

More than fifteen years ago an agreement was made among the stockholders of said Rolling Mill Company whereby the plaintiffs became the joint owners and holders of all the bonds sued upon herein. I was a party to said agreement which was executed on the 20th day of December, 1879.

3. This interrogatory is fully answered in my answer to the second interrogatory.

JOHN A. KURTZ.

Subscribed and sworn to before me this 1st day of October, 1898.

[SEAL.] JOHN E. HOLLETT,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Charles W. Mansur.

The affiant and plaintiff, Charles W. Mansur, in answer to the three interrogatories annexed to the answer of defendant herein, says:

72 1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one-half of one thousand dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's father William Mansur was one of the stockholders in the Indianapolis Rolling Mill Company and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by

agreement among the said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my said father died without leaving any will, and leaving myself and my mother Hannah A. Mansur as his only heirs, and we each acquired a one-half interest in the one thousand dollar interest in the bonds owned by my said father, William Mansur.

3. This interrogatory is fully answered in my answer to the second interrogatory.

CHARLES W. MANSUR.

Subscribed and sworn to before me this 28th day of September, 1898.

[SEAL.] GEORGE E. HUME,
Notary Public, Marion County, Indiana.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to The Indianapolis Rolling Mill Company.

The affiant and plaintiff the Indianapolis Rolling Mill Company in answer to the three interrogatories annexed to the answer of defendant herein, says:

1. That its interest is an undivided interest in and to the bonds sued upon herein in the proportion that twelve hundred dol-
73 lars with interest thereon bears to all the other bonds sued on herein.

2. That said bonds were taken by this plaintiff in payment for iron furnished by it to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock and by agreement among the said stockholders, to which this plaintiff was a party more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein. Upon the distribution of said bonds as aforesaid twelve hundred dollars thereof still remain as an asset of the company being the interest still owned by it and mentioned in said agreement with the stockholders.

3. This interrogatory is fully answered in the answer to the second.

AQUILLA Q. JONES,
Pres't Indianapolis Rolling Mill Co.

STATE OF INDIANA, *County of Marion, ss:*

Aquilla Q. Jones, being duly sworn says that he is the president of the Indianapolis Rolling Mill Company and makes this affidavit

for and on behalf of said company. That he has read the foregoing answers to the interrogatories propounded in the above entitled action and says that said answers are true.

AQUILLA Q. JONES.

Subscribed and sworn to before me this 28th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

74 *Answers to Interrogatories Addressed to David A. Myers, Administrator of the Estate of A. R. Forsythe, Deceased.*

The affiant and plaintiff, David A. Myers administrator of the estate of A. R. Forsythe, deceased, in answer to the three interrogatories annexed to the answer of defendant herein says on information and belief:

1. That he is the administrator of the estate of A. R. Forsythe, deceased and his testator's interest is an undivided interest in all the bonds sued on herein in the proportion that one hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That A. R. Forsythe was one of the stockholders of the Indianapolis Rolling Mill Company and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; and said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

3. This interrogatory is fully answered in my answer to the second interrogatory.

DAVID A. MYERS.

Subscribed and sworn to before me this 1st day of October, 1898.

[SEAL.] M. D. TACKETT,
Clerk Decatur Circuit Court.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Complainants,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Hannah A. Mansur.

The affiant and plaintiff, Hannah A. Mansur, in answer to the three interrogatories annexed to the answer of defendant herein, says:

75 1. That her interest is an undivided interest in and to the bonds sued on herein in the proportion that one-half of one thousand dollars with interest thereon bears to all the other bonds sued on herein.

2. That plaintiff's husband, William Mansur, was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in paying for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among the said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein.

Some years after the execution of said agreement my said husband died without leaving any will and leaving myself and my son Charles W. Mansur as his only heirs, and we each acquired a one-half interest in the one thousand dollar interest owned by my said husband in said bonds.

3. This interrogatory is fully answered in my answer to the second interrogatory.

HANNAH A. MANSUR.

Subscribed and sworn to before me this 28th day of September, 1898.

[SEAL.] GEORGE E. HUME.
Notary Public, Marion County, Indiana.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Meridian National Bank.

The affiant and plaintiff the Meridian National Bank in answer to the interrogatories annexed to the answer of defendant herein, says:

1. That its interest is an undivided interest in all of the bonds sued on herein in the proportion that eighteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

76 2. That the plaintiff the Meridian National Bank was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; that said bonds were turned over to said stockholders as dividends on their stock and by agreement among the said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

3. This interrogatory is fully answered in the answer to the second interrogatory.

STATE OF INDIANA, *County of Marion, ss:*

Frederick Fahnley, being duly sworn says that he is the President of the Meridian National Bank, and that he makes this affidavit for and on behalf of said bank; that he has read over the foregoing answers to interrogatories and that the same are true as affiant verily believes.

FREDERICK FAHNLEY, *Pres't.*

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Wabash College.

The affiant and plaintiff, Wabash College in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That its interest is an undivided interest in all the bonds

77 sued on herein in the proportion that two thousand dollars with interest thereon bears to all the other bonds sued on herein.

2. That the plaintiff, Wabash College was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky; that said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago,

the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

3. This interrogatory is fully answered in the answer to the second.

STATE OF INDIANA, *County of Marion, ss:*

Theodore H. Ristien being duly sworn says that he is the treasurer of Wabash College, and he makes this affidavit for and on behalf of said College; that he has read over the foregoing answers to interrogatories and that the same are true as affiant verily believes.

THEODORE H. RISTIEN, *Treasurer.*

Subscribed and sworn to before me this 30th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Elizabeth N. Hasselman, Administratrix of the Estate of Lewis W. Hasselman, Deceased.

The affiant and plaintiff, Elizabeth N. Hasselman in answer to the three interrogatories annexed to the answer of defendant herein says:

78 1. That she is the administratrix of the estate of Lewis W. Hasselman, deceased, and that her testator's interest is an undivided interest in all the bonds sued on herein, in the proportion that five hundred dollars, with interest thereon, bears to all the other bonds sued on herein.

2. That said Lewis W. Hasselman was one of the stockholders in The Indianapolis Rolling Mill Company and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky and said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

3. This interrogatory is fully answered in my answer to the second interrogatory.

ELIZABETH W. HASSELMAN,
Adm'x of the Estate of Lewis W. Hasselman, Dec.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answer to Interrogatories Addressed to Maria D. Leach.

The affiant and plaintiff Maria D. Leach in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That her interest is an undivided interest in and to the bonds sued upon herein in the proportion that thirty-five hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That she obtained said interest from her brother Charles
79 B. Parkman who is now dead. That said Parkman was one of the stockholders of the Indianapolis Rolling Mills Company and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County. Said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago the plaintiff- became the joint owners and holders of all the bonds and coupons sued on herein.

This plaintiff and affiant acquired her interest as sole legatee and devisee of her said brother Charles B. Parkman.

3. This interrogatory is fully answered in my answer to the second interrogatory.

MARIA D. LEACH.

Subscribed and sworn to before me this 26th day of September, 1898.

[SEAL.] PETER E. CORBETT,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Eliza C. Hendricks.

The affiant and plaintiff, Eliza C. Hendricks in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That her interest is an undivided interest in and to the bonds sued upon herein in the proportion that eighteen hundred dollars with interest thereon bears to all the other bonds sued on herein.

2. That she obtained said interest from her husband Thomas A. Hendricks who is now dead. That said Thomas A. Hendricks was one of the stockholders of the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cum-
80 berland and Ohio Railroad through Green County. Said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds and coupons sued on herein.

This plaintiff and affiant acquired her interest as sole legatee and devisee of her said husband Thomas A. Hendricks.

3. That interrogatory is fully answered in my answer to the second.

ELIZA C. HENDRICKS.

Subscribed and sworn to before me this 27th day of September, 1898.

[SEAL.] IDA J. AYRES,
Notary Public.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
COUNTY OF GREEN, ETC., Defendants.

Answers to Interrogatories Addressed to Richard J. Bright.

The affiant and plaintiff, Richard J. Bright in answer to the three interrogatories annexed to the answer of defendant herein says:

1. That his interest is an undivided interest in and to the bonds sued upon herein in the proportion that one thousand dollars with interest thereon bears to all the other bonds sued on herein.

2. That he was one of the stockholders of the Indianapolis Rolling Mill Company and said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland and Ohio Railroad through Green County, Kentucky. Said bonds were turned over to said stockholders as dividends on their stock and by agreement among said stockholders more than fifteen years ago, the plaintiffs became the joint owners and holders of all of the bonds and coupons sued on herein.

81 3. The third interrogatory is fully answered in my answer to the second interrogatory.

R. J. BRIGHT.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] JOHN J. McGRAIN,
Notary Public.

And on the 4th day of October, 1898, came the plaintiffs by their attorneys and on their motion it is ordered that this case be continued until the next term of this court.

And on the 10th day of April, 1899, the defendant, Green County, comes and suggests the death of A. R. Forsythe, one of the plaintiffs herein who is named in the petition as E. R. Forsythe, and suggests the death of Harriet Jones one of the plaintiffs herein, which death occurred prior to February 21, 1895.

The suggestion of death above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, Kentucky District.

No. 6361.

JOHN THOMAS and Others, Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Suggestion of Death of A. R. Forsythe and Harriet Jones.

The defendant, Green County, comes and suggests the death of A. R. Forsythe, one of the plaintiffs herein who is named in the petition as E. R. Forsythe, and suggests the death of Harriet Jones one of the plaintiffs herein which occurred prior to Feb. 21st, 1895.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Att'ys for Def't.

STATE OF INDIANA, *Marion County, ss:*

82 Be it known, that on the 21st, day of Feb., 1895, being the 50th judicial day of the Jan., term 1895, of the Marion Circuit Court, of Marion County held at the Court House in the City of Indianapolis, County of Marion and State of Indiana, before the Honorable Edgar A. Brown, sole judge of said court, the following proceedings were had in the matter of the estate of Harriet Jones.

In the Matter of the Estate of HARRIET JONES.

An instrument of writing purporting to be the last will and testament of Harriet Jones is now presented in open court and application made for the probate thereof, and comes now A. C. Ayres, one of the subscribing witnesses to said instrument who being duly sworn in open court testifies in relation thereto as well and as to the

competency of said testatrix to make the same said testimony is now reduced to writing and signed by said witness.

Said instrument of writing and the testimony in proof thereof *is* now submitted to the court and the court having examined the same and being fully advised finds said instrument in writing to be the last will of Harriet Jones deceased, and that the same has been duly proved and orders and directs that the same be admitted to probate and record as such. Whereupon the proper certificate of probate is endorsed on said will and the same is now duly recorded. Said will — testimony in proof thereof and certificate of probate indorsed thereon being as follows (here insert).

Comes now Jno. W. Jones and files his affidavit herein and thereon moves the court for letters testamentary upon the estate of said decedent and he now files bond as such executor, which bond the court approves and letters as prayed are now in open court duly issued. Said affidavit, bond and letters being as follows: (here insert).

O. Book 110-432.

STATE OF INDIANA, *Marion County, ss:*

I, George B. Elliott, clerk of the Marion Circuit Court of Marion County, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the proceedings had in said court, and entered on the records thereof, in the above entitled cause, on the day and year first aforesaid, as appears of record in my office.

In testimony whereof, I hereunto subscribe my name,
83 and affix the seal of said Circuit Court, at my office, in the city of Indianapolis, this 18th day of April, 1898.

[SEAL.] GEORGE B. ELLIOTT,
Clerk Marion Circuit Court, Marion County, Indiana.

One ten cent stamp.

And on the 2nd day of October, 1899, came the parties by their attorneys, and on their motion it is ordered that said case be set for hearing October 19th, 1899.

And on the 20th day of October, 1899, came the parties by their attorney-. The defendant by its attorneys filed an amended answer herein.

It is ordered that this case be set for hearing October 31st, 1899.

The amended answer above referred to is as follows:

United States Circuit Court, Sixth Circuit, District of Kentucky.

No. 6361.

JOHN THOMAS, ETC., Plaintiffs,
vs.
THE COUNTY OF GREEN, Defendant.

Amended Answer.

Now comes the defendant, Green County, and for further answer herein to the petition as amended, and by leave of court amends its answer as follows:

The defendant denies knowledge or information sufficient to form belief whether John Thomas, L. N. Hasselman, died within twelve months last past, that is, within twelve months prior to the 3rd day of October, 1898, and denies that Harriet Jones died within twelve months of October 3rd, 1898.

The defendant denies knowledge or information sufficient to form a belief as to whether the alleged undivided interest of said John Thomas deceased, held in the bonds or coupons sued on herein passed to or vested in the said Knippenberg as executor of the said John Thomas, deceased, and denies knowledge or information
84 sufficient to form a belief whether by the terms of the will of Harriet Jones, deceased, she devised or bequeathed all or any part of her undivided interest in the bonds or coupons sued upon in this action to Elisha P., John W., Benjamin F., Cora, Aquilla Q. Edwin S., William M., and Frederick Jones and Emma J. Holloway; and denies knowledge or information sufficient to form a belief whether the alleged undivided interest which said Harriet Jones, deceased, held jointly with the other plaintiffs herein in or to the bonds or coupons sued on in this action passed, under the laws of the state of Indiana, or by the will of the said Harriet Jones, to and vested in her alleged children above named; and denies that they now own the undivided interest of said Harriet Jones if she ever had any interest, in said bonds and coupons, and denies that she or they held or had an undivided interest in the bonds and coupons in this action sued on; and denies that the bonds or coupons herein sued on, or any of them, are owned jointly by the following named persons; and denies that they have an undivided interest in all the bonds and coupons herein sued on, namely, Henry Knippenberg, executor of John Thomas, deceased, Elizabeth W. Hasselman, administratrix of L. W. Hasselman, deceased; Marion D. Leach, Shirley D. Murphy, Jessie D. Woods, Helen R. Edson, W. E. Rockwood, Charles P. Rockwood, Eliza C. Hendricks, Mrs. R. K. Lord, the Wabash College, the Meridian National Bank; Hannah A. Mansur, Charles W. Mansur, William S. Hubbard, George B. Yandis, A. R. Forsythe, Indianapolis Rolling Mill Company, J. N. Kinney, R. J. Bright, J. A. Kurtz, J. C. Thomas and H. L. Breneman, the last two as executors of Briggs Swift, deceased, Elisha P. Jones, John W. Jones, Benjamin

F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones, and Emma J. Holloway, and defendant says said Harriet Jones deceased died more than twelve months before and pleads said death and the abatement thereby of this action in bar of plaintiffs' claims herein.

Further answering herein, the defendant, Green County, says that heretofore, to-wit, the Indianapolis Rolling Mill Company a corporation organized and existing under and by virtue of the laws of the state of Indiana, by some means obtained possession of the bonds and coupons in this action sued on and thereafter declared among its stockholders a dividend of said bonds which were received by them, the stockholders aforesaid, as a dividend and were distributed among them as such; that among the stockholders aforesaid were the plaintiffs as originally named in this action; that said dividend and distribution to said stockholders as of bonds and coupons in the following proportions: $500.00 to Elizabeth W. Hasselman, deceased; $1,800.00 to Thomas A. Hendricks, deceased; Aquilla Jones, $1,400.00; William M. Mansur, deceased, $1,000.00; W. S. Hubbard, $1,000.00; George B. Yandes, $1,500.00, W. O. Rockwood, $5,300.00; A. R. Forsythe, $100.00; Dillard C. Ricketts, $6,600.00 Richard J. Bright, $1,000.00; The Wabash College $2,000.00, Indianapolis Rolling Mill Company $1,200.00 retained as an asset of the said company out of all the bonds aforementioned and still owned by it; Briggs Swift, $1,000.00, Charles B. Parkman, $3,500.00; L. F. Peck, $500.00 which bond the said Peck devised to the Presbyterian Church Mission in Indianapolis which received said bond and afterwards transferred the same to plaintiff, John A. Kurtz; the other bonds represented in this suit, and which were part of those declared as a dividend and distributed to the stockholders, came into the hands by transfer through said stock dividend and distribution in some way unknown to the defendant. J. N. Kinney and Mrs. R. K. Lord, the exact number of bonds given to them or the stockholders who they represent, this defendant cannot state.

85

Defendant further answering, says that after said declaration of said dividend, and transfer of said bonds to said stockholders, they owning separate and distinct bonds, and having separate and distinct interests, by virtue of the distribution of said bonds by said Indianapolis Rolling Mill Company as a dividend as aforesaid, and having distinct interests by virtue of said dividend and distribution, and the obligations of said Green County to them, if any ever existed, which this defendant has already denied, being separate and distinct as to each obligation, joined their interest in the bonds aforementioned for the sake of convenience only and aggregated their bonds together for the purpose of giving a Federal Court jurisdiction of a suit by all of said bondholders to enforce said bonds or coupons; and this defendant says that only a few of said stockholders received bonds of an amount sufficient to give jurisdiction to a Federal Court, this court especially being intended; and this defendant further says that the said plaintiffs or said original stockholders do not and could not by law become partners in the ownership of said bonds, certain

of the plaintiffs and of said stockholders being corporations,
86 and one of said plaintiffs being a national bank; and defendant further says that this Honorable Court has no jurisdiction of this action by reason of said alleged joint ownership of said bonds, and that especially it has no jurisdiction of, and this defendant is not liable to suit by, the bondholders herein above named, whose interests are respectively less than two thousand dollars, and defendant says that the alleged interests are less than two thousand dollars, and without the jurisdiction of this court, of the following named plaintiffs, that is, Elizabeth N. Hasselman, Eliza C. Hendricks, the alleged Jones heirs, W. S. Hubbard, the alleged heirs of William Mansur, George B. Yandes, A. R. Forsythe, Richard J. Bright, Meridian National Bank, the Wabash College, Indianapolis Rolling Mill Company, the representatives of Briggs Swift, deceased, and John A. Kurtz.

D. T. TOWLES,
Judge Green County Court.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Att'ys for Def't.

STATE OF KENTUCKY, *County of Green:*

D. T. Towles, Judge of the Green County Court states that he believes that the statements in this amended answer are true.

D. T. TOWLES,
J. G. C. C.

Subscribed and sworn to before me by D. T. Towles, Judge of the Green County Court, this 7th April, 1899.

[SEAL.] P. F. MARSHALL,
Clerk Green C. C.

And on the 28th day of October, 1899, came the plaintiffs by Simrall & Doolan, their attorneys and filed their reply to the amended answer herein, which said reply is as follows:

United States Circuit Court, Sixth Circuit, District of Kentucky.

No. 6361.

JOHN THOMAS ET AL., Plaintiffs,
vs.
COUNTY OF GREEN ET AL., Defendants.

87 *Reply to Amended Answer.*

For reply to the answer herein filed October 20th, 1899, the plaintiffs deny that they owned separate and distinct bonds or that they have separate and distinct interests by virtue of the distribution of said bonds, by the said Indianapolis Rolling Mills Company

as a dividend, or that they have distinct interests by virtue of said dividend distribution, and they deny that the obligation of Green County to them is a separate and distinct obligation to each of them. They deny that they joined their interests in the bonds before mentioned for the sake of convenience.

They deny that they joined or aggregated their bonds together for the purpose of giving this or any Federal Court jurisdiction of a suit by all of said bondholders to enforce said bonds or coupons. They say that by agreement between them they became joint owners of said bonds as stated in the original petition, and this was done in good faith, and that they are still *bona fide* joint owners of said bonds.

They deny the allegation that the said plaintiff or said original stockholders did not and could not by law become partners in the ownership of said bonds. They say that they are not partners, but joint owners of said bonds and coupons and every part of them.

They deny the allegation that this Honorable Court has no jurisdiction of said action by reason of said alleged joint ownership of said bonds, and they deny the allegation that this defendant is not liable to a suit by the bondholders named in said amended answer, and having fully replied, they continue to pray as before.

SIMRALL & DOOLAN,
Of Counsel and Att'ys for Plaintiffs.

John G. Simrall says that he is one of the attorneys for the plaintiffs, all of whom are absent from this district and state, and that the statements contained in the above reply are true.

JNO. G. SIMRALL.

Subscribed and sworn to before me by John G. Simrall, this 28th day of October, 1899.

LEON P. LEWIS,
N. P. J. Co., Ky.

My commission expires at the end of the next session of the Kentucky Senate.

88 And on the 31st day of October, 1899, came the parties by their attorneys. The defendant by its attorneys filed its rejoinder herein.

It is ordered that this case be passed until November 6th, 1899.

The rejoinder above referred to is as follows:

United States Circuit Court, Sixth Circuit, District of Kentucky.

No. 6361.

JOHN THOMAS, &c., Plaintiffs,
vs.
THE COUNTY OF GREEN, Defendant.

Rejoinder.

For rejoinder herein to the 1st paragraph of the reply defendant denies that all or any of the bonds or coupons sued on herein were issued according to law, and denies that it so appears by the various orders of said Green County Court, copies of which are filed with said reply; and denies that said Cumberland and Ohio Railroad was ever built through Green County, and denies that the proceeds of said bonds or coupons were expended in said Green County for location or constructing said railroad through said county, and denies that said county was exonerated from a payment of its subscription to the Elizabethtown and Tennessee Railroad Company, and denies that its defenses as herein asserted are asserted for the first time, or that they are asserted for the first time after thirty years; and denies that this county has not claimed to have said defenses for many years and before said bonds were ever pretended to have been issued; and denies that the plaintiffs are the joint *bona fide* holders or owners of said bonds or coupons, for value or otherwise.

And for rejoinder to paragraph 3 of said reply denies that said county of Green ever subscribed to the capital stock of said Cumberland and Ohio Railroad Company in accordance with the act of the Legislature of Kentucky authorizing the same, and denies that it ever so subscribed in accordance with the order of said Green County Court, approved by vote, of the people and voters of said county; and denies that the defendant issued said bonds or coupons according to law, and denies that said county placed said
89 bonds on the market to be sold, and denies that the plaintiffs, or their assignors, purchased the same in the ordinary course of business for full value, without any knowledge or notice of any defense, either in the execution or delivery of same, or any defense which existed or was claimed to exist against said bonds; and denies that said Green County ever had delivered to it or ever accepted, the capital stock of said Cumberland and Ohio Railroad Company to the amount of $250,000.00 or any sum and denies that said stock is still held by said Green County, and denies that said county, or its authorized agents or attorneys have been negotiating for a settlement of said bonds or coupons by means of a compromise; and denies that said county has, or said agents or attorneys have always recognized the validity of said bonds or coupons until this action was brought, but says it is true that this defendant is unable to pay the same, even if they were a legal obligation; and it denies that this defendant is estopped to deny the validity of said

bonds or coupons, and denies that the plaintiffs rely upon said alleged estoppel.

For rejoinder to paragraph 4 of said reply the defendant admits that some of the plaintiffs or the persons from whom the plaintiffs derived title, brought two suits in this court against this defendant, Green County on alleged coupons and recovered judgments in this court against said Green County on said alleged coupons, but this defendant says that said judgments went by default; that this defendant employed an attorney to defend said defendant in said cases who neglected to attend to said cases and thereby permitted judgment to go by default, and that this defendant did not discover said default of said attorney nor that said judgments has been rendered, until too late to make a motion for a new trial, in those actions, even though a motion for a new trial could have prevailed, and, for the reasons aforesaid, and because this defendant has a good defense to said suits, as was believed by said county and its attorneys, this defendant is not estopped by reason of anything decided in said two actions, and that there was no issue raised in said actions on any of the questions as set forth, in said reply by reason of the neglect of the said attorney, but this defendant denies that it is concluded or estopped by reason of anything had or done in said two actions in which default judgment was obtained against this defendant; and denies that in said actions there was involved
or put in issue, or that the issues were the same, as made by
90 its answer in this suit; and denies that anything was adjudged in said actions except the right to recover a specific sum of money represented by the coupons in that action, upon which the plaintiff therein obtained judgment by default.

For further rejoinder, defendant says that the issues involved in the mandamus case of Thomas, etc., against Green County, No. 5987 are shown by the record in that action, and that this defendant does not understand that anything as to the validity or invalidity of said coupons sued on in said two actions in which this judgment is sought to be enforced by mandamus is involved; that in said mandamus case and proceedings No. 5987, Thomas &c., against Green County, the questions involved are alone the rights of the plaintiffs to enforce a judgment against Green County, and denies that this defendant is thereby or otherwise concluded or further or at all estopped by reason of said mandamus proceedings based upon a judgment by default and which the plaintiffs obtained, by accident, to set up any defense it may have to the bonds or coupons in this action sued on, which are not the same bonds or the same coupons upon which judgment was obtained, by default.

D. T. TOWLES,
J. G. C. C.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Att'ys for Def't.

STATE OF KENTUCKY, *County of Green:*

D. T. Towles, Judge of the Green County Court, states that he believes that the statements in this rejoinder are true.

D. T. TOWLES,
J. G. C. C.

Subscribed and sworn to before me by D. T. Towles, Judge, Green County Court this — ——, 1899.

[SEAL.]

P. F. MARSHALL,
Clerk G. C. C.

And on the 6th day of November, 1899, came the parties by their attorneys. The plaintiffs by their attorneys filed their demurrer to the defendant's rejoinder herein. It is ordered that said demurrer be set for hearing November 13, 1899.

And on the 15th day of November, 1899, came the parties by their attorneys. This case coming on to be heard upon the
91 plaintiff's demurrer to the defendant's rejoinder and having been argued by counsel and the court being fully advised thereof, it is considered by the court that said demurrer be and the same is hereby sustained.

It is further considered by the court that the defendant do have until November 25, 1899, to amend said rejoinder.

And on the 25th day of November, 1899, came the defendant by Ernest Macpherson its attorney and filed its amended rejoinder herein, as follows:

Circuit Court of the United States, Sixth Circuit, Kentucky District.

JOHN THOMAS and Others, Complainants,
vs.
GREEN COUNTY, Defendant.

Amended Rejoinder.

Now comes the defendant Green County, and by leave of court amends the fourth paragraph of its rejoinder herein, and for said fourth paragraph as originally filed substitutes the following:

The defendant Green County, denies that the plaintiffs in this action were all parties to the actions No. 5348 and 5965 in this Honorable Court mentioned in the pleadings of the present plaintiffs; and denies that the plaintiffs in the suits just mentioned and numbered were the persons from whom all the plaintiffs herein derived title if any they have; and the defendant denies that it is concluded or estopped by reason of anything had or done, or any judgment given or made in the two actions No. 5348 and 5965 in this Honorable Court in which John Thomas and others were alleged to be plaintiffs; and denies that in said actions just mentioned there

was any issue ever formed, or any matters or things therein involved were put in issue, and denies that the issues were the same or nearly the same as made by the answer of this defendant herein; and denies that anything was adjudged in said actions just mentioned and numbered except the right to recover a specific sum of
92 money. And defendant further says that in said action No. 5348 of John Thomas against Green County judgment by default was rendered by this Honorable Court on February 8, 1887, and an execution therein was returned "no property found" on May 3rd, of 1887, that the summons in said action was served on October 4, 1882; and defendant says that in said action No. 5965 of John Thomas and others against this defendant a judgment by default was entered and rendered therein by this Honorable Court on February 21, 1887, and the execution of *fieri facias* was returned "no property found" on May 3rd, 1887; and defendant says it did not know of the rendition of said judgments by default or learn thereof and not until the petition in the mandamus suit still pending in this Honorable Court of John Thomas and others against this defendant, which petition was filed on August 3, 1887, and until the summons was served on this defendant on August 23, 1887; and this defendant further says that the judgments in said actions numbered 5348 and 5965 in which the parties were different from the parties in this action, were rendered by default, and without a trial by jury or a trial by the court of the facts; and when this defendant discovered that said judgments had been rendered in said two actions numbered 5348 and 5965 it was too late by law to make a motion for a new trial even if such a motion could be made in the Circuit Court of the United States for the District of Kentucky after a judgment by default had been rendered. And the defendant further says that the defenses to the present claim of the present plaintiffs in this action are not the same as could have been presented in the said two suits No. 5965 and 5348 aforementioned; and the defendant discovered only a short time before its amended answer was filed herein on Oct. 20, 1899, that even the plaintiffs in the present suit had concluded and conspired together to make a suit cognizable in this court for the purpose of giving a factitious jurisdiction thereto and that this defense just mentioned for this reason could not have been made in the suits No. 5348 and 5965 aforementioned. And defendant further says that in the two suits last mentioned it employed an attorney believed to be competent to present its defenses by answer in said suits, who undertook said employment, and the said attorney neglected to attend to said case and thereby permitted judgment to go by default; and that this defendant did not discover, said default of said attorney nor that said judg-
93 ments had been rendered until too late to make a motion for a new trial in those actions even though a motion for a new trial could have prevailed; and this defendant had a good defense to said suits at the time, but not all of the defenses now herein presented to the claim of the plaintiffs in this action.

And defendant further says that the issues involved in the mandamus case of Thomas and others, against Green County, No. 5987

are shown by the record in that action and merely involve the right of Thomas and others, plaintiffs in said mandamus action, to enforce the default judgments aforementioned, and no issue could in said action be legally raised as to the validity or invalidity of the coupons alleged to have been issued by this defendant; and this defendant is not estopped by reason of said mandamus proceedings based upon judgments by default, to set up any defense it may have to the bonds or coupons in this action sued on, which are not the same bonds or the same coupons upon which judgment was obtained by default. And this defendant makes the records in said suits No. 5348 and 5965 a part of this rejoinder, and asks that they be read upon the hearing and trial of this action.

D. T. TOWLES,
J. G. C. C., by Att'ys.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Att'ys for Def't.

D. T. Towles, Judge of the Green County Court, states that he believes that the statements contained in this amended rejoinder are true.

D. T. TOWLES,
J. G. C. C.

Subscribed and sworn to before me by D. T. Towles, Judge of the Green County Court this the 23rd day of November, 1899.

[SEAL.] P. F. MARSHALL,
Clerk G. C. C.

And on the 1st day of December 1899, came the plaintiffs having Simrall & Doolan for their attorneys. Came also the defendant hav- Earnest Macpherson for its attorney. The plaintiffs by their said attorneys filed their demurrer to the amended rejoinder of the defendant and said demurrer having been argued by said attorneys and the court being fully advised thereof, it is considered by the court that said demurrer be and the same is hereby overruled.

94 The Demurrer above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JOHN THOMAS and Others, Complainants,
vs.
GREEN COUNTY, Defendant.

Demurrer to Amended Rejoinder.

The plaintiffs demur to the affirmative allegations of the amended rejoinder herein, beginning with the allegation "And defendant further says that in said action No. 5348 John Thomas *vs.* Green County, Judgment by default as rendered" and continuing through

to the end of said amended rejoinder, and for ground of demurrer state that said portion of said amended rejoinder does not state any defense to the claim set up herein by the plaintiffs, and they pray judgment of this honorable court whether they shall be compelled to further plead herein.

SIMRALL & DOOLAN,
Of Attorneys for Plaintiffs.

I hereby certify that the foregoing demurrer is in my opinion well founded in law.

JNO. G. SIMRALL.

John G. Simrall being sworn, deposes and says that he is one of the attorneys for the plaintiffs, and that the foregoing demurrer is not interposed for delay.

JNO. G. SIMRALL.

Subscribed and sworn to before me by John G. Simrall this 1st day of December, 1899. My commission expires at the end of the next Session of the Kentucky Senate.

LEON P. LEWIS,
N. P., J. Co., Ky.

And on the 23rd day of December, 1899, came the plaintiffs by Simrall & Doolan, their attorneys, and filed their sur rejoinder herein, as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

95 No. 6361.

JOHN THOMAS and Others, Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Sur Rejoinder.

The plaintiffs for the answer to the affirmative matter of the amended rejoinder, deny the allegation that the defendant did not know of the rendition of said judgment by default or learn thereof until more than forty two (42) days after the rendition thereof, or not until the petition in the mandamus suit was filed or until summons was served on said defendant. They deny that the parties in said actions No. 5348 and 5965 were different from the parties in this action, and they deny that the judgments were rendered in said actions without a trial by the court of the facts.

They deny that when the defendant discovered that judgments had been rendered in said two actions that it was too late by law to make motion for a new trial. They deny the allegation that the

defenses to the present claim of the plaintiffs in this action are not the same as could have been presented in the said two suits.

They deny that the defendant ever discovered that the plaintiffs in the present suit had colluded or conspired together to make a suit cognizable in this court for the purpose of giving fictitious jurisdiction thereto. They deny that these plaintiffs or any of them colluded or conspired together to give this court jurisdiction or for any other purpose whatever. They deny that they or either of them have sufficient knowledge or information to form a belief as to whether the defendant employed an attorney to present its defenses by answer in the said suits, or that any attorney undertook said employment, or that said attorney neglected to attend to said case, or that said defendant did not discover said default or that said judgments had been rendered until too late to make a motion for a new trial. They deny that the said defendants had any defense to said suits at the time, or ever had any defense to said suits. They deny that the issues involved in the mandamus case of Thomas and others against Green County merely involved the right of Thomas and others to enforce their judgments before mentioned. Plaintiffs deny the allegation that the defendants are not estopped by reason of said mandamus proceedings based upon the judgments by
96 default to set up any defense it may have to the bonds or coupons sued on in the judgments therein.

SIMRALL & DOOLAN,
Attorneys for Plaintiffs.

John G. Simrall states that he is one of the attorneys for the plaintiffs in the above styled case all of whom are absent from this district, and that the statements contained in the foregoing answer are true.

JNO. G. SIMRALL.

Subscribed and sworn to before me John G. Simrall this 22nd day of December, 1899. My commission expires at the end of the next Session of the Kentucky Senate.

LEON P. LEWIS,
N. P., J. Co., Ky.

And on the 1st day of October, 1900, came the parties by their attorneys and on their motion, it is ordered this case be and the same is hereby passed.

And on the 18th day of February, 1900, came the parties by their attorneys, and on their motion, it is hereby ordered that this case be and the same is hereby passed.

And on the 12th day of October, 1903, came the defendant by Earnest Macpherson, its attorneys and filed an amended answer herein.

The amended answer above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky.

JOHN THOMAS, ETC., Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Amended Answer.

97 Comes now defendant Green County, and amending its answer herein says that the charter of the Cumberland and Ohio Railroad Company mentioned in the petition contained Section 16, which, among other things, declared that said Cumberland and Ohio Railroad Company "shall have all the powers and privileges conferred upon said Louisville & Nashville Railroad Company by the laws of Kentucky, for constructing and operating their said proposed railroad, not herein specified, and granted and not in conflict with the terms of this charter."

Defendant says that by an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend the charter of the Louisville & Nashville Railroad Company" approved January 17, 1856, (1 Acts 1855-56, page 181) it was declared and enacted in sub-section 6 of section 1, thereof among other things "that said railroad company may receive subscriptions of stock to their company by individuals towns, cities, counties and other corporations, whether payable in money or other things; with such terms, and time of payment, conditions annexed and kind of payment, that may be set forth in the subscription" etc.

The defendant Green County further answering says that heretofore to wit on the 16th day of May, 1868, said county by vote of its people subscribed three thousand shares (3000) of one hundred dollars each to the capital stock of the Elizabethtown & Tennessee Railroad Company and that thereafter on the 20th day of May, 1868, there was in pursuance of the vote of the people so subscribing, entered upon the records of the Green County Court the following order and subscription in words and figures as follows, an attested copy of which is filed herewith as part hereof, marked Exhibit 1.

May Called Term, Green County Court, May 20th, 1868.

At a county court called and held for Green County on the 20th day of May, 1868, at the court house in Greensburg.

Present: T. R. Barnett, Presiding Judge.

This day T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green County Court, produced their certificate in words and figures following, viz:

We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green County Court, duly authorized to compare the poll books of Green County, certify that at an election held in said county at the various voting places in said county on 16th day of May,

1868, on the question whether the County Court of Green
98 County, shall for and on behalf of said county subscribe for three thousand shares of capital stock of the Elizabethtown and Tennessee Railroad Company to be paid for in the bonds of said county payable in twenty years and bearing six per cent. interest payable semi-annually in the City of New York with interest coupons attached thereto. That five hundred and eighty six votes were cast for said subscription and two hundred and four against said subscription, May 20th, 1868.

T. R. BARNETT.
D. T. TOWLES.

It is therefore ordered by the court that the said vote be and is now entered of record as follows, to-wit:

Five hundred and eighty six votes were cast for said subscription and two hundred and four votes were cast against said subscriptions, showing that there is a majority for said subscription of three hundred and eighty two votes.

It is now therefore ordered that the clerk of this court for and — behalf of the County of Green make, said subscription on the terms specified in the order submitting the question to a vote as aforesaid.

Ordered that the court adjourn.

THOS. R. BARNETT,
P. J., G. C. C.

Defendant says that said Cumberland and Ohio Railroad Company more than twenty-four years ago abandoned the road contemplated by its charter, and that by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend and act, entitled 'An act to incorporate the Cumberland and Ohio Railroad Company' approved February 24, 1869" which was approved March 18, 1878, and which amended act was adopted by said Cumberland and Ohio Railroad Company said original road contemplated by its charter was abandoned and said road was divided into two railroad corporations known and designated respectively as the Northern Division of the Cumberland and Ohio Railroad Company and the Southern Division of the Cumberland and Ohio Railroad Company.

Further answering herein, the defendant says that heretofore to-wit, on the 17th day of June, 1869, two persons made a request of the Green County Court in the words and figures, as follows:

We, the undersigned Commissioners of the Cumberland and Ohio Railroad Company hereby request the County Court of Green
99 County to submit to a vote of the qualified voters of said county the "question" whether said court shall subscribe for and on behalf of said county and in pursuance of the provisions of the charter of said railroad company two hundred and fifty thousand dollars to the capital stock of said company payable in the bonds of said county having twenty years to run and bearing six per cent. interest from date upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county and

shall expend the amount so subscribed within the limits of Green County and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid, until said County of Green shall be fully and completely exonerated from the payment of the capital stock of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company."

An attested copy of said request is filed herewith as part hereof marked "Exhibit A."

Defendant says that on the same 17th day of June, 1869, Thomas R. Barnett alone, and not associating with him in the consideration of the request aforesaid, the justices of the peace of said county, caused to be entered in the records of the Green County Court, a pretended order of said Green County Court in words and figures, as follows:

"Present: Thos. R. Barnett, Judge.

Whereas the commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the county court of Green County to order an election in the said county of Green and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company having twenty years to run and bearing six per cent. interest from date, and payable in the bonds of said county upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg in said county and shall expend the amount so subscribed within the limits of Green County, and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad until said county of
100 Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green County at the several voting places in said county be held and conducted by the several officers as prescribed by law for holding elections on the 3rd day of July, 1869, to vote on the questions as to whether or not the said county court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland & Ohio Railroad conditioned and to be paid as above stated."

An attested copy of said pretended order is filed herewith as part hereof marked "Exhibit B."

Defendant says that the said Thomas R. Barnett had no authority by the charter of the Cumberland and Ohio Railroad Company or by the general laws of Kentucky in force on the 17th day of June, 1869, to enter the last mentioned order, nor to order the election therein called.

Defendant further says that thereafter and on the 3rd day of

June, 1870, the said Thomas R. Barnett alone, and not associating with him the justice- of the peace of said county, caused a pretended order of the Green County Court to be entered on the records thereof, which order is in words and figures as follows:

"Present, Thos. R. Barnett, Judge.

Whereas in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green on the 3rd day of July, 1869, at the several precincts of said county and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of said company. Now thereof, I, Thomas R. Barnett the presiding judge of the Green County Court by virtue of the authority in me vested, by law and to carry out the wish of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for and on behalf of said county of Green which subscription is to be paid in the bonds of said county as prescribed in said order of submission and this subscription is to be made with the
101 conditions set out in the order of this court ordering said election and now of record in the office of this county."

An attested copy of said pretended order of the Green County Court of the 3rd day of July, 1870, is filed herewith as part hereof, marked "Exhibit C."

Defendant further says that hereafter and on the 12th day of October, 1871, the said Thomas R. Barnett alone and not associating with him the justices of the peace of said county, caused a pretended order of the Green County Court to be entered on the records thereof which order is in words and figures as follows:

"Present: Thos. R. Barnett, Judge.

On motion of E. H. Hobson, director of the Cumberland and Ohio Railroad it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad be and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green County to the said railroad in the following denominations to-wit, the same to be conditioned as specified in the order submitting the vote of the said county.

125 bonds at	$1,000	125,000.00
200 bonds at	500	100,000.00
250 bonds at	100	25,000.00
		$250,000.00

An attested copy of said pretended order of the Green County Court of the 12th day of October, 1871, is filed herewith as part hereof, marked "Exhibit D."

Defendant further answering, says that all the pretended bonds and coupons in the petition mentioned, were issued under the orders

and proceedings of the said Thomas R. Barnett, county judge of Green County, and had no other authority or jurisdiction or consideration therefor than his proceedings in the premises. Defendant says that the first request of the alleged commissioners of the railroad in relation to bonds to be issued in favor of the Cumberland & Ohio Railroad was addressed to the county court of Green County, and solicited its action in the premises, and that the county court of Green County, never in any way acted on said request, or passed or made any order in relation to bonds to be issued or that ever was issued by Green County; that each and every order or pre-

102 tended order made by the said Thomas R. Barnett as Judge of the Green County Court was made at a called term thereof, and not at any regular term of said court, thereby excluding all the magistrates or justices of the peace of said county from participation in or concurrence or advice with reference to the issuance of said alleged bonds or said subscription or said election or of any other matter pertaining thereto; and defendant says that at all the times mentioned in said orders of the County Judge alone at special or called terms, all the offices of magistrates and justices of the peace of said county as required by law were then filled and that there were persons duly and properly elected and qualified and acting as justices of the peace of said county and essential parts of the county court in all actions in relation to the fiscal affairs of said Green County.

Defendant further says that on the 16th day of January, 1872, the said Thomas R. Barnett, alone, caused to be entered, an order on the records of the Green County Court, an attested copy of which is filed herewith as part hereof marked "Exhibit E."

Defendant further says that on the 9th day of February, 1872, the said Thomas R. Barnett caused to be entered upon the records of the Green County Court a pretended order an attested copy of which is filed herewith as part hereof marked "Exhibit E."

Defendant says the last two orders have no bearing upon the issues herein involved.

Defendant further says that on the 15th day of April, 1872, the said Thomas R. Barnett alone, and not associating with him the justices of the peace of Green County Court, caused to be entered on the records of the Green County Court a pretended order in words and figures as follows:

"Present: Thos. R. Barnett, Judge.

Application was this day made to the presiding judge of the County Court of Green County, by President and Board of Directors, of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company and the court being sufficiently advised it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued to be signed by the judge of the said county court of Green County and countersigned by the clerk of said court, as required by the charter of said company."

103 An attested copy of said last mentioned order is filed herewith as part hereof marked "Exhibit G."

Defendant further answering, says all the bonds pretended to be

issued by Green County, or the Green County Court, were, except as to numbers and amounts of the exact words, following:

No. 89. UNITED STATES OF AMERICA, $500.00
County of Green, State of Kentucky,

For the Cumberland and Ohio Railroad.

Twenty years after date the county of Green in the state of Kentucky, will pay the holder of this bond the sum of five hundred *and* dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America in the city of New York.

In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D., 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

[Green County Seal.]

T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*"

Defendant further says that all the coupons pretended to have been issued by Green County or the Green County Court were, except as to numbers and amounts and periods of maturity, in the words and figures as set forth in the petition; and that Thomas R. Barnett the county judge, signed each of the bonds pretended to have been issued by Green County and the name of the clerk of the county court was lithographed under each coupon.

Defendant says that no one of the bonds or coupons ever pretended to have been issued by Green County, contained any recital whatever, mention of, or reference to the charter of the Cumberland and Ohio Railroad Company or of any general law, and that no one of said alleged bonds or coupons contained the conditions affixed and made part thereof by the pretended orders of the said Thomas R. Barnett, Judge, or of the Green County Court.

Defendant further says that upon the entry of the pretended order of the 15th day of April, 1872, hereinbefore in this paragraph fully set forth, the county judge thereupon delivered all said bonds
104 and coupons and that before delivering said bonds and coupons he was warned not to deliver or issue them, but that nevertheless he did so, and in so doing he and those acting with him, upon the part of said Cumberland and Ohio Railroad Company, thereby perpetrated a fraud upon this defendant.

Defendant further says that the time said pretended bonds and coupons were delivered there was no railroad whatever of the Cumberland & Ohio Railroad Company in any part of Green County; that neither then nor since has the Cumberland & Ohio Railroad Company or any other railroad company or corporation, or corporations, or individual or individuals ever erected or constructed a railroad through Green County and within one mile of the town of

Greensburg; that there is now only four and one-fifth (4 1-5) miles of railroad in Green County, and these do not run through Green County, and were constructed or made by companies or persons other than the Cumberland & Ohio Railroad Company; that there is no railroad now and never was any railroad running through Green County either by itself or by connecting with any other road or railroad; that no part of the proceeds, of any of said alleged bonds or coupons, and particularly these mentioned in the petition, was ever spent or used in Green County in the construction of any railroad therein, that this defendant was never exonerated completely or at all from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court of the Elizabethtown and Tennessee Railroad or any part of the interest therein; that all the conditions described in the orders or pretended orders under which the pretended subscription to the Cumberland & Ohio Railroad Company is alleged to have been made, and the vote of the people prescribing the conditions were disregarded and were never fulfilled at the time of said alleged issuance and execution of said bonds or since; that Green County never received any consideration whatever for any of said alleged bonds or coupons, and particularly those mentioned in the petition herein.

The defendant therefore alleges that all of said bonds and coupons were issued without authority in law and in fraud of the rights of the tax payers of Green County, and are without consideration in whole or in part and are void in law and that any pretended consideration for said bonds and coupons issued as aforesaid or any of them has wholly failed and the same are null and void.

165 Defendant further says that at the time plaintiff became, if he ever became, the owner and holder of the coupons or bonds mentioned in petition, he knew that said Cumberland and Ohio Railroad Company did not run through Green County, and within one mile of the town of Greensburg, and had notice of all the other defects and irregularities aforementioned in this paragraph and was bound to know in law, the contents of the orders or pretended orders under which said alleged bonds or coupons were pretended to have been issued, and took them subject to all equities and with the infirmities hereinbefore in this paragraph mentioned.

Defendant further says that by the terms of the charter of the Cumberland and Ohio Railroad Company in section 15 thereof, it was declared "That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad" meaning the Cumberland & Ohio Railroad Company; and defendant says that said road never having passed through the county of Green before, or at the time of said alleged subscription or since, there was no authority ever given by said act or charter of the Cumberland & Ohio Railroad Company to Green County or the Green County Court, or the Judge thereof to subscribe for stock in said road, and the pretended subscription in the petition mentioned, and also in the proceedings of the county judge, Thomas R. Barnett, and his pretended orders was, were and are without authority of law and void, and this defendant, Green County, is in no legal way bound thereby.

Wherefore defendant prays that the coupons sued on herein be adjudged void and without consideration, and that plaintiffs' action be dismissed and that the defendant recover its costs herein expended, and for all proper general and special and proper relief.

ERNEST MACPHERSON,
JOHN W. LEWIS,
D. T. TOWLES,
Att'ys for Green County.

Elliott Graham, Judge of the Green County Court, says that he believes that the statements of his answer are true.

ELLIOTT GRAHAM,
Judge of Green County Court.

Subscribed and sworn to before me by Elliott Graham, this 9th day of October, 1903.

P. F. MARSHALL,
Clerk Green County Court.

106 EXHIBIT 1.

Green County Court, May Called Term, 1868, 20th Day of May, 1868.

Present: T. R. Barnett, Judge.

This day T. R. Barnett presiding judge and D. T. Towles, clerk of the Green County Court *this day* produced their certificate in words and figures — follows, viz: We T. R. Barnett, presiding judge and D. T. Towles, clerk of the Green County Court duly authorized to compare the poll book of Green County, certify that at an election held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county court of Green County shall for and on behalf of said county subscribe for 3,000 shares of the capital stock of the Elizabethtown and Tennessee Railroad Company, to be paid for in the bonds of said county payable in 20 years and bearing six per cent. interest payable semi-annually in the city of New York with interest coupons attached thereto, that 586 votes were cast for said subscripion and 204 against said subscription.

T. R. BARNETT.
D. T. TOWLES.

May 20th, 1868.

It is therefore ordered by the court that the said vote be and is now entered of record as follows, to-wit: 586 votes were cast for said subscription and 204 votes were cast against said subscription showing that there is a majority for said subscription of three hundred and eighty-two votes. It is now therefore ordered that the clerk of this court for and on behalf of the county of Green make said

subscription on the terms specified in the order submitting the question to a vote as aforesaid.

A copy attest:

P. B. MARSHALL,
Clerk Green County Court.

EXHIBIT A.

Green County Court, June Called Term, 1869, 17th Day of June, 1869.

Present: Thos. R. Barnett, Judge.

The following request of the Commissioners of the Cumberland and Ohio Railroad Company was this day produced into court, viz:

We, the undersigned commissioners of the Cumberland
107 and Ohio Railroad Company hereby request the county court of Green County to submit to a vote of the qualified voters of said county the "question" whether said court shall subscribe for and on behalf of said county and in pursuance to the provisions of the charter of said railroad company two hundred and fifty thousand dollars to the capital stock of said company payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county and shall expend the amount so subscribed within the limits of Green County and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company.

D. T. TOWLES.
B. W. PENICK.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

EXHIBIT B.

Green County Court, June Called Term, 1869, 17th Day of June, 1869.

Present: Thos. R. Barnett, Judge.

Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company has requested the county court of Green County to order an election in the said county — the question whether said county court shall subscribe for and on behalf of said county, two

hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company having twenty years to run and bearing six per cent. interest from date, and payable in the bonds of said county upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg in the said county and shall expend the amount so subscribed within the limits of Green County and also
108 upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green County, at the several voting precincts in said county be held and conducted by the several officers as prescribed by law for holding elections on the 3rd day of July, 1869, to vote on the question as to whether or not the said county court of Green County shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland & Ohio Railroad, conditioned and to be paid as above stated.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

Green County Court, June Called Term, 1870, 3rd Day of June, 1870.

Present: Thomas R. Barnett, Judge.

Whereas in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green on the 3rd day of July, 1869, at the several precincts of said county and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of said company. Now therefore, I, Thomas R. Barnett the presiding judge of the Green County Court by virtue of the authority in me vested by law and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for and on behalf of the said county of Green which subscription is to be paid in the bonds of said county as prescribed in said order of subscription and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this court.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

109 EXHIBIT D.

Green County Court, October Called Term, 1871, 12th Day of October, 1871.

Present: Thomas R. Barnett, Judge.

On motion of E. H. Hobson director of the Cumberland and Ohio Railroad it is ordered that Z. T. Smith, President of the Cumberland and Ohio Railroad — and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars the amount of the subscription of Green County, to the said railroad in the following denominations, to-wit; the same to be conditioned as specified in the order submitting the vote of the said county;

125 bonds at	$1,000	125,000.00
200 bonds at	500	100,000.00
250 bonds at	100	25,000.00
		$250,000.00

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

EXHIBIT F.

Green County Court, February Called Term, 1872, 9th Day of February, 1872.

Present: T. R. Barnett, Judge.

Application was this day made to the presiding judge of the county court of Green County by the Cumberland and Ohio R. R. Company to issue bonds of said county to the amount of $5,000, the same being a portion of the stock subscribed for and on behalf of said county by the county court of Green County, to said Cumberland and Ohio Railroad, and the court being sufficiently advised, it is ordered that the bonds of said county to the amount of $5,000 be and the same *is* hereby ordered to be issued and signed as required by the charter of said Cumberland & Ohio Railroad Company.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

110 EXHIBIT G.

Green County Court, April Called Term, 1872, 15th Day of April, 1872.

Present: Thos. R. Barnett, Judge.

Application was this day made to the presiding judge of the county court of Green County by president and board of directors

of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company and the Court being sufficiently advised it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, to be signed by the judge of said county court of Green County, and countersigned by the clerk of said court as required by the charter of said company.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

EXHIBIT E.

Green County Court, Jan. Called Term, 16th Day of January, 1872.

Present: T. R. Barnett, Judge.

On motion, Cumberland & Ohio R. R. Company ordered that the presiding judge of Green County Court issue the bonds of said county for the sum of thirteen thousand dollars said sum being a portion of the stock subscribed for and on behalf of said county to said railroad company, said sum being required to pay E. H. Hobson who advanced the money for surveying and locating the road to Greensburg, Ky.

T. R. BARNETT,
P. J., G. C.

A copy attest:

P. F. MARSHALL,
Clerk Green County Court.

And on the 14th day of March, 1904, the defendant Green County by Ernest Macpherson and John W. Lewis, attorneys, moves the court for a rule on the surviving plaintiffs named in the petition and amended petitions herein, to furnish the dates of the deaths of the parties plaintiffs named in said pleadings, who have died since the institution of this action and to show cause why this action should not be dismissed for failure to revive within the time prescribed by law.

111

Came the plaintiffs by John G. Simrall, their attorney and entered their appearance to said motion.

And on the 10th day of October, 1904, came the parties by their counsel; it is ordered that this case be set for hearing October 26, 1904.

And on the 26th day of October, 1904, came the plaintiffs, by John G. Simrall, their attorney. Came also the defendant by Ernest Macpherson. The plaintiffs by their said attorney filed a response to the rule awarded against them herein. This cause coming on

to be heard upon the sufficiency of said response and the court not being fully advised thereof takes time.

The response above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
GREEN COUNTY and Others, Defendants.

Plaintiffs' Response to Rule.

1. The plaintiffs for response to the rule issued herein on 14th March, 1904, say they have no knowledge of the death of any of the plaintiffs except such as shown in the record herein and the action has been revived in the names of their proper personal representatives.

2. The plaintiffs are joint owners of and partners in the bonds sued on and the right of action survives and no revivor is necessary.

3. Since the death of said parties, the defendant has had
112 many orders made herein and filed amended answers and waived any right it may have had to have the action revived.

SIMRALL & DOOLAN,
Attorneys for Plaintiffs.

Jno. G. Simrall says he is one of the attorneys for plaintiffs who are all absent from the state of Kentucky and the allegations of the foregoing response are true as he believes.

JNO. G. SIMRALL.

Subscribed and sworn to before me this March 18, 1904, by John G. Simrall.

My commission expires January 5, 1908.

W. L. DOOLAN,
Notary Public, Jefferson Co., Ky.

And on the 7th day of November, 1904, the court being now sufficiently advised it is ordered by the court that the defendant's motion for a rule on the surviving plaintiffs named in the petition and amended petitions to furnish the dates of the deaths of the parties plaintiffs named in the said pleadings, who have died since the institution of this action, and to show cause why this action should not be dismissed for failure to revive within the time prescribed by law entered herein March 14, 1904, be and the same is hereby overruled, to which the defendant excepts.

And on the 21st day of March, 1905, came the parties by their attorneys and filed their written stipulation herein which is as follows: "It is stipulated between the parties that the court shall try this case without the intervention of a jury and it is stipulated be-

tween the parties that the court shall try this case as submitted without a jury is hereby expressly waived and the issues of fact herein are hereby submitted to the court.

JOHN G. SIMRALL,
Attorney for Plaintiff.
ERNEST MACPHERSON AND
JOHN W. LEWIS,
Attorneys for Defendant.

And on the 22nd day of March, 1905, came the plaintiffs by John G. Simrall, their attorney, and the defendant by
113 Ernest Macpherson and John W. Lewis, its attorneys, and the plaintiffs filed their demurrer to each paragraph of the amended answer of defendant filed herein on the 12th day of October, 1903, and also filed a reply to said amended answer and thereupon the defendant filed a demurrer to said reply and also filed a rejoinder thereto, and thereupon the defendant moved the court to dismiss this action on the ground of misjoinder of plaintiffs and for want of jurisdiction of such of the plaintiffs whose claims are separately less than two thousand dollars ($2,000.00); and thereupon the plaintiffs and the defendant filed a stipulation as to evidence to be heard upon said motions and upon the hearing of this action and which stipulation also contained a waiver of a jury herein and thereupon the motions aforesaid and the action were submitted to the court for judgment.

The demurrer, reply, demurrer and rejoinder above referred to are as follows, to-wit:

United States Circuit Court for the Western District of Kentucky.

6361.

JOHN THOMAS, &C., Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Demurrer to Amended Answer.

The plaintiffs and each of them demur to the amended answer filed herein on the 12th day of October, 1903, and to each paragraph thereof, because neither it nor any paragraph thereof states any facts sufficient to constitute a defense.

JNO. G. SIMRALL,
Attorney for Plaintiff.

John G. Simrall says that he is one of the attorneys for the plaintiffs herein, who are all absent from this county, that the foregoing demurrer is not interposed for the purpose of delaying this action; that same is well taken.

JNO. G. SIMRALL.

Subscribed and sworn to before me by John G. Simrall, this 18th day of March, 1905.

My commission expires January 5, 1908.

W. L. DOOLAN,
Notary Public in and for Jefferson Co., Ky.

114 Circuit Court of the United States for the Western District of Kentucky.

JOHN THOMAS, &c., Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Reply to Amended Answer.

The plaintiffs for reply to the amended answer of the defendant here, deny that said bonds or said coupons in the petition mentioned, were or any of them was executed without consideration, or that the plaintiffs were aware at any time that any consideration therefor went to the County of Green. Plaintiffs deny that the road of said Cumberland and Ohio Railroad Company never passed through the county of Green.

Plaintiffs deny that no railroad has ever been constructed through Green county, and deny that the railroad in Green county was not constructed by the Cumberland & Ohio Railroad Company.

Plaintiffs deny that no part of the proceeds of the bonds and coupons sued on was spent or used in Green county, in the construction of a railroad therein, and say that all the proceeds of said bonds and of all the bonds issued by said county to said Cumberland & Ohio Railroad Company and other moneys to a great amount was so spent and used in said county.

Plaintiffs deny that the defendant was never exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said county to the Elizabethtown & Tennessee Railroad and plaintiffs say that said Green county was fully and completely exonerated from the payment of its subscription for capital stock of the said Elizabethtown & Tennessee Railroad Company before the issue or delivery of the bonds herein sued on, or any of them.

Plaintiffs deny that all or any of the conditions prescribed in the orders under which the subscription to the Cumberland & Ohio Railroad Company was made, or that any vote of the people prescribing any condition were or was disregarded or not fulfilled; and deny that Green county did not receive full consideration for said bonds and coupons and all of them.

115 Plaintiffs say that by an Act of the General Assembly of the Commonwealth of Kentucky approved on the 18th day of March, 1878, the corporation called the "Cumberland and Ohio Railroad Company" was divided into two corporations, one of which was named the "Southern Division of the Cumberland & Ohio Railroad Company" and was invested with all the property

rights of said Cumberland & Ohio Railroad Company in and to the right of way and railroad materials thereon of said Cumberland & Ohio Railroad Company on all the lines of its projected railroad south of Washington county, Kentucky, including said line through Green county; that on September 19, 1878, the railroad of said Southern Division was incomplete, but the roadway had been almost entirely graded, a large amount of masonry for bridges had been built, and a large amount of cross-ties and rails had been purchased and placed upon said right of way, but said Southern Division, on account of insufficient means, was unable to complete the building of its said railroad, and on said date the said Southern Division of the Cumberland & Ohio Railroad Company had been authorized by a vote of its stockholders, including the defendant, Green county, to execute and did on said date, execute a lease on the Louisville & Nashville Railroad Company for the term of twenty-five (25) years of all its property, by the terms of which lease said Louisville & Nashville Railroad Company agreed to take the right of way, cross-ties, railroad iron and other railroad materials and construct said railroad through Green county as far as and into the town of Greensburg; that by the terms of said lease it was further provided that said Southern Division Company should issue bonds to the amount of three hundred thousand dollars ($300,000.00) payable twenty (20) years after date, with interest at seven per cent. secured by a mortgage on all the property of said Southern Division Company to be guaranteed as the payment thereof by said Louisville & Nashville Railroad Company and to be delivered to said Louisville & Nashville Railroad Company as security for the payment of the sums expended by it for the construction of said railroad, with the privilege to said Louisville & Nashville Railroad Company to sell bonds at not less than ninety cents ($.90) on the dollar, and if any bonds should remain after reimbursing said Louisville & Nashville Railroad Company, such bonds to be returned to said Southern Division Company; that under said contract of lease with said Southern Division of the Cumberland & Ohio Railroad Company as aforesaid authorized by the vote of the stockholders of said company, including the defendant Green county, the said Louisville & Nashville Railroad
116 Company completed the building of said railroad through Green county, as far as and into the town of Greensburg, and said railroad has ever since been operated, through Green county, as far as and into the town of Greensburg.

Plaintiffs further states that said Southern Division of the Cumberland & Ohio Railroad Company expended the amount so subscribed by Green county to the capital stock of the Cumberland & Ohio Railroad Company to-wit: two hundred and fifty thousand dollars ($250,000.00) within the limits of Green county.

Plaintiffs deny that by any act of the General Assembly of the Commonwealth of Kentucky entitled "An Act to Amend an act to incorporate the Cumberland and Ohio Railroad Company" said original road was abandoned.

Plaintiffs deny that all or any of the said bonds or coupons were

issued without authority in law or in fraud of the rights of the taxpayers of Green county.

Plaintiffs deny that the said Thomas R. Barnett, Judge of the Green County Court, had no authority by the charter of the Cumberland & Ohio Railroad Company or by the general laws of Kentucky in force on June 17, 1869, to enter the orders referred to in the amended answer herein, or to order the election referred to in the orders filed with said amended answer. Plaintiffs say that the orders made and entered by the said Thomas R. Barnett, as referred to in said amended answer, were made by him in his capacity as Judge of the Green County Court and as expressly authorized by an act of the General Assembly of Kentucky. Plaintiffs deny that the orders referred to in the amended answer filed herein are, or any of them were, pretended orders, but say that all of said orders were real and genuine orders made by Green county and as authorized by an act of the General Assembly of Kentucky.

Wherefore plaintiffs pray as in their petition, and for all proper relief.

JNO. G. SIMRALL,
Attorney for Plaintiffs.

John G. Simrall says that he is one of the attorneys for the plaintiffs herein, all of whom are absent from this county, and that the statements of the foregoing reply are true as he verily believes.

JNO. G. SIMRALL.

Subscribed and sworn to before me this March 18th, 1905, by John G. Simrall.

My commission expires January 5th, 1908.

W. L. DOOLAN,
Notary Public, Jefferson County, Kentucky.

117 Circuit Court of the United States for the Western District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Demurrer.

The defendant, Green County, demurs to the reply this day filed of the plaintiffs herein, because it does not state facts sufficient to constitute or to support a cause of action against this defendant, or to present a defense to the pleadings of this defendant.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Attorneys for Defendant.

Circuit Court of the United States for the Western District of Kentucky.

JOHN THOMAS and Others, Plaintiffs,
vs.
GREEN COUNTY, Defendant.

Rejoinder.

The defendant, Green County, for rejoinder to the reply of plaintiff this day filed herein, denies that all proceeds of the bonds or all the bonds issued by said county to said Cumberland and Ohio Railroad or other moneys to a great amount was spent or used in said county in the construction of a railroad therein and denies that Green County was fully or completely or at all exonerated from the payment of its subscription for capital stock of the Elizabethtown and Tennessee Railroad Company before the issue or delivery of the bonds herein sued on or any of them; and denies that on September 19th, 1878, the roadway of said Southern Division had been almost entirely graded or a large amount of masonry for bridges had been built or a large amount of cross ties or rails had been purchased or placed upon said right of way in Green
118 County and denies that on said date or at any time the said Cumberland Division of said Ohio Railroad Company had been authorized by the stockholders including those of Green County, to execute the release in said reply mentioned, and denies that Green County ever authorized the execution of said lease and denies that said contract of lease was ever authorized by the vote of Green County, voting as a stockholder, and denies that said Southern Division of said Cumberland and Ohio Railroad Company expended the amount subscribed by Green County, to the capital stock of the Cumberland and Ohio Railroad Company, to-wit: two hundred and fifty thousand dollars ($250,000.00) within the limits of Green County, and defendant denies that the orders made and entered by the said Thomas R. Barnett as referred to in the amended answer of defendant herein were expressly or at all authorized by an act or any act of the General Assembly of Kentucky, and denies that all or any of said orders were authorized by an act or any act of the General Assembly of Kentucky.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Attorneys for Defendant.

Ernest Macpherson says he is one of the attorneys for Green County, defendant herein, and he verily believes the statements contained in the foregoing rejoinder are true.

ERNEST MACPHERSON.

Subscribed and sworn to before me this 20th day of March, 1905. My commission expires February 19, 1906.

GEORGE A. BRENT,
Notary Public, Jefferson County, Kentucky.

And on the same day, to-wit: on the 22nd day of March, 1905, came the plaintiffs by John G. Simrall, their attorney and the defendant by Ernest Macpherson and John W. Lewis, its attorneys and stipulated as follows:

1. The pleadings, exhibits, answers to interrogatories and deposition herein, and the testimony and evidence by deposition and orally, taken read or heard upon the hearing of the case of L. G. Quinlan *vs.* Green County at the October 26th, 1904, term of this court, are subject to all legal exceptions to be treated and read
119 so far as applicable, as testimony and evidence in this action on the hearing of the motions of defendant to dismiss and on the merits of the case this day submitted.

2. The issues of fact in this case may be tried and determined by the court without the intervention of a jury, a jury being hereby waived.

And on the 1st day of June, 1905, the following judgment was entered:

This action by a stipulation in writing, having been heretofore submitted to the judgment of the court without the intervention of a jury and the court having heard the evidence and the arguments of counsel and being now sufficiently advised, makes part of this judgment the following:

Findings of Fact.

1. The court finds that all the plaintiffs are citizens of other states than Kentucky, and were so when this action was instituted on the 29th day of August, 1894, and that the plaintiffs were then the *bona fide* holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.

2. That the Cumberland & Ohio Railroad Company was a corporation organized and existing under the laws of the state of Kentucky, with power to receive a subscription to its capital stock from the defendant Green County, and said county was authorized conformably to law to make a subscription to said capital stock and to pay for the same in the bonds of said county.

3. That on June 17th, 1869, there was, as appears from the records thereof, presented to the Green County Court by the Commissioners of said Railroad Company the following request:

"We the undersigned Commissioners of the Cumberland and Ohio Railroad Company, hereby request that the county court of Green County submit to a vote of the qualified voters of said county, the 'question' whether said court shall subscribe for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date, upon the condition that said company shall
120 locate and construct said railroad through Green County, and within one mile of the town of Greensburg in said

county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company."

4. That on the same day, namely, on June 17th, 1869, the County Judge of Green County, acting alone and as the county court, entered an order in the said court in the following language:

"Present: Thos. R. Barnett, Judge.

"Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green County, to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company, payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is, therefore, ordered by the court that an election by the qualified voters of Green County, at the several voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the 3rd day of July, 1869, to vote on the question as to whether or not the said county
121 court of Green County shall for and on behalf of said county, subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad conditioned, and to — paid, as above stated."

5. That at the election held pursuant to said order there were cast in favor of said proposition and subscription a majority of the votes of the qualified voters of said county, and this fact, upon being duly ascertained, was certified by the proper officers as required by law.

6. That on the 3rd day of June, 1870, the County Judge of said county, acting alone and as the County Court of said county, entered an order in said court as follows:

"Present: Thomas R. Barnett, Judge.

"Whereas in pursuance of an order of this court made on the 17th

day of June, 1869, an election was held in said county of Green, on the 3rd day of July, 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company; now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of said company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company, for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission and this subscription is made with the conditions set out in the order of this court, ordering said election and now of record in the office of this county."

7. That on the 12th day of October, 1871, the said County Judge of said county, acting alone and as the county court of said county, entered an order in said court in the following language:

"Present: Thomas R. Barnett, Judge.

"On motion of E. H. Hobson, director of the Cumberland and Ohio Railroad, it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the sub-
122 scription of Green County, to the said railroad in the following denominations, to-wit: the same to be conditioned as specified, in the order submitting the vote of the said county:

"125 bonds at	$1,000	$125,000.00
"200 bonds at	500	100,000.00
"250 bonds at	100	25,000.00
		$250,000.00"

8. That pursuant to all that was done, as aforesaid, the defendant Green county, issued and delivered to the said Cumberland and Ohio Railroad Company $250,000 of its bonds of the description aforesaid, except that the said conditions were not stated therein, in payment of said subscription to said capital stock, and thereupon there was delivered to said county in payment thereof, and said county received and has ever since held and owned, the certificates of the said railroad company for the 2,500 shares of $100 each of its capital stock so paid for by said bonds.

9. That the bonds and coupons sued on in this action were part of the bonds thus issued and delivered to said railroad company in payment for said stock.

10. That while the proposed line of said railroad was located through said county from its northern line to its southern line, and within one mile of Greensburg, yet that only about five miles of said railroad *has* ever been constructed or attempted to be constructed in

said county, the part thus constructed extending from the northernmost line of said county to the town of Greensburg, the county seat, which town is located about 15 miles from the southernmost line of the county, and about as distant from any other line of the county except the northern line.

11. That only $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green county. No other part of said bonds was expended in said county.

12. That with said $150,000 of said bonds the grading, bridging and tunneling on the track of said railroad was done and paid for over the five miles aforesaid, but no further, and when this was done, the work on the railroad was suspended for some years. Afterwards the rails and ties and superstructure generally were put upon the track theretofore graded and the railway was completed from the northernmost line of the county to Greensburg under the terms of its lease by the Louisville & Nashville Railroad Company, at its own expense, and not with any of the bonds issued as aforesaid by the defendant.

13. That on the 15th day of April, 1872, at a called term of the Green County Court, over which Thomas R. Barnett, County
123 Judge, presided, and no justice of the peace being present, the following order was entered by said court:

"Present: Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the County Court of Green county, by the President and Board of Directors of the Cumberland and Ohio Railroad Company, to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland and Ohio Railroad Company and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

14. That except as to the number of the bond and the amount agreed to be paid therein the bonds sued on were each of the following tenor, namely:

"UNITED STATES OF AMERICA. $500.00

County of Green, State of Kentucky.

For the Cumberland and Ohio Railroad.

Twenty years after date, the county of Green, in the State of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

In testimony whereof, the Judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first

day of April, A. D., 1871; and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

[Green County Seal.]

T. R. BARNETT, *Judge.*
D. T. TOWLES, *Clerk.*"

As appears on the face of each of said bonds there was no recital therein of any of the facts herein found to be true.

15. That the plaintiffs knew when they purchased the bonds sued on that the railroad had not been constructed in Green county otherwise than as herein found to be the fact, namely, from the northern line of said county to the town of Greensburg, but no further.

124 16. That in the year 1868, upon a proposition therefor being submitted to the vote of the qualified voters of Green county, the majority of said qualified voters voted in favor of a proposition to subscribe for $300,000 of the capital stock of the Elizabethtown & Tennessee Railroad Company, and upon the said result of the election being properly ascertained and certified the County Judge of Green county, sitting alone and as the county court of said county, made and entered of record in said court the following orders:

"Green County Court, May Called Term, 1868, 20th Day of May, 1868.

"Present: T. R. Barnett, Judge.

"This day T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, *this day* produced their certificate in words and figures, as follows, viz: We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, duly authorized to compare the Poll Book of Green county, certify that — an election held in said county, at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribe for 3,000 shares of the capital stock of the Elizabethtown and Tennessee Railroad Company, to be paid for in the bonds of said county payable in twenty years and bearing six per cent. interest, payable semi-annually in the city of New York, with interest coupons attached thereto, *and* that 586 votes were cast for said subscription and 204 against said subscription.

May 20th, 1868.

T. R. BARNETT.
D. T. TOWLES.

"It is therefore ordered by the court that the said vote be, and is now, entered of record, as follows, to-wit: 586 votes were cast for said subscription and 204 votes were cast against said subscription, showing that there is a majority for said subscription of three hundred and eighty-two votes.

"It is now therefore ordered that the clerk of this court, for and

on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

17. That no formal or express exoneration of said county from the payment of said last named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last named railroad company, have ever been issued or delivered
125 in execution of said orders or under the terms of said subscription.

Upon consideration of the facts herein before found to be true, and of the opinion of the Court of Appeals in the case of J. D. Shortell *vs.* Green county, the court, in deference to said opinion, has reached the following

Conclusions of Law.

1. That the plaintiffs are not entitled to recover because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made and upon which the bonds sued on were issued have not been performed or complied with, and,

2. That the failure to recite in the bonds any of the facts herein found to be true, or any of the conditions upon which the bonds were issued, is immaterial as against the defense that there was a failure to perform the said conditions.

Judgment.

In consideration of the premises it is considered and adjudged by the court that the plaintiffs' petition be and it is dismissed, and that the defendant recover of the plaintiffs its costs herein expended, and may have execution therefor. To this judgment and to each part of it the plaintiffs each and all except.

And on the 30th day of June, 1905, came the plaintiffs John Thomas and others by John G. Simrall, their attorney and presented to the court their petition for writ of error and assignment of errors, and in consideration whereof, it is now ordered that said petition for writ of error and assignment of errors be and they are hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Sixth Circuit, the judgment and proceedings entered and had herein upon the plaintiffs' giving bond according to law in the sum of $500.00.

The Petition *of* Writ of Error and Assignment of Errors above referred to, are as follows:

United States Circuit Court, Western District of Kentucky.

6361.

JOHN THOMAS, Individually and as Executor of Thos. P. Hendricks; DILLARD RICKETS, GEORGE B. YANDES, JOHN A.
126 KURTZ, HELEN M. ROCKWOOD and C. B. PARTMAN, the Last Two Named Persons as Executors of W. O. Rockwood, Deceased; WILLIAM S. HUBBARD, AQUILLA JONES, C. B. PARKMAN, THOMAS A. HENDRICKS, WABASH COLLEGE, INDIANAPOLIS ROLLING MILLS COMPANY, WILLIAM MANSUR, MERIDIAN NATIONAL BANK, A. R. FORSYTHE, J. N. KINNEY, R. J. BRIGHT, BRIGGS SWIFT, L. W. HASEELMAN, MARIA D. LEACH, CHARLES D. MURPHY, JESSIE D. WOOD, HELM R. EDSON, W. E. ROCKWOOD, ELIZA C. HENDRICKS, HARRIET JONES, MRS. R. K. LORD, E. R. FORSYTHE, J. C. THOMAS, and H. L. BRENEMAN, the Last Two as Executors of Briggs Swift, Deceased; J. H. KURTZ, JOHN THOMAS, Trustee for T. Hendricks; T. HENDRICKS, and SHERLEY D. MURPHY, Plaintiffs,

vs.

GREEN COUNTY, Defendant.

Petition for Writ of Error.

And now comes John Thomas (individually and as executor of Thomas P. Hendricks), Dillard Rickets, George B. Yandes, John A. Kurtz, Helen M. Rockwood and C. B. Parkman (the last two named persons as executors of W. O. Rockwood, deceased), William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Haseelman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. S. Thomas and H. L. Breneman (the last two as executors of Briggs Swift, deceased), J. H. Kurtz, John Thomas (Trustee for T. Hendricks), T. Hendricks, and Sherley D. Murphy, plaintiffs herein, by John G. Simrall, their attorney, and say that on the 1st day of June, A. D., 1905, this court entered judgment herein in favor of the defendant Green County, against said plaintiffs, in which judgment and the proceedings had prior thereunto, in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in their behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of errors so complained of,
127 and that a transcript of the records, proceedings and papers in this case duly authenticated may be sent to the said Court of Appeals.

JNO. G. SIMRALL,
Attorney for Plaintiffs in Error.

United States Circuit Court for the Sixth Circuit and Western District of Kentucky.

6361.

JOHN THOMAS, Individually and as Executor of Thos. P. Hendricks; DILLARD RICKETS, GEORGE B. YANDES, JOHN A. KURTZ, HELEN M. ROCKWOOD, and C. B. PARKMAN, the Last Two Named Persons as Executors of W. O. Rockwood, Deceased; WILLIAM S. HUBBARD, AQUILLA JONES, C. B. PARKMAN, THOMAS A. HENDRICKS, WABASH COLLEGE, INDIANAPOLIS ROLLING MILLS COMPANY, WILLIAM MANSUR, MERIDIAN NATIONAL BANK, A. R. FORSYTHE, J. N. KINNEY, R. J. BRIGHT, BRIGG SWIFT, L. W. HASSELMAN, MARIA D. LEACH, CHARLES D. MURPHY, JESSIE D. WOOD, HELEN R. EDSON, W. E. ROCKWOOD, CHAS. B. ROCKWOOD, ELIZA C. HENDRICKS, HARRIET JONES, MRS. R. K. LORD, E. R. FORSYTHE, J. C. THOMAS, and H. L. BRENEMAN, the Last Two as Executors of Briggs Swift, Deceased; J. H. KURTZ, JOHN THOMS, Trustee for T. Hendricks; T. HENDRICKS, and SHERLEY D. MURPHY, Plaintiffs,

vs.

GREEN COUNTY, Defendant.

Assignment of Errors.

Afterward, to-wit, on the 30th day of June, A. D., 1905, came the plaintiffs, John Thomas (individually and as executor of T. Hendricks, Dillard Rickest, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman (the last two named persons as executors of W. O. Rockwood, deceased), William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Charles B. Rock-
128 wood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas and H. L. Breneman (the last two as executors of Brigg Swift, deceased), J. H. Kurtz, John Thoms (Trustee for T. Hendricks), T. Hendricks, and Sherley D. Murphy, by John G. Simrall, their attorney, and say that in the record of the proceedings in the above entitled cause in the Sixth Circuit of the Western District of Kentucky, there is manifest error in this, to-wit:

I.

In adjudging that plaintiffs' petition be dismissed and in dismissing said petition, and in adjudging that the defendant recover of plaintiffs its costs in said cause expended and have execution.

II.

In finding and adjudging that plaintiffs in error were not entitled to recover upon their cause of action asserted in the said cause because the conditions had not been performed or complied with upon which the subscriptions for the capital stock of the Cumberland & Ohio Railroad Company was made, to-wit; the conditions that said company should locate and construct its railroad through Green County and within one mile of the town of Greensburg in said county and should expend the amount so subscribed within the limits of Green County and that its said defendant's bonds for payment of its subscription to the capital stock of said company should not be issued or said county pay any part of either principal or interets of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Eliabethtown and Tennessee Railroad Company; and in deciding and adjudging that said plaintiff could not recover because any one of the conditions above recited had not been performed and complied with.

III.

In finding and adjudging that plaintiffs in error were not entitled to recover upon the cause of action asserted in said cause because the conditions of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been performed or complied with; that said company should locate and construct its railroad through Green County, and within one mile of the town of Greensburg in said county.

129 IV.

In deciding and adjudging that said plaintiffs in error were not entitled to recover upon said cause of action because the condition of said subscription for the capital stock of the Cumberland and Ohio Railroad Company had not been complied with, that said company should expend the amount so subscribed within the limits of Green County.

V.

In finding and adjudging that plaintiffs in error were not entitled to recover upon its cause of action because the condition of said subscription for the capital stock of the Cumberland & Ohio Railroad Company had not been performed or complied with, that said defendant's bonds for payment of its subscription to the capital stock of said company should not be issued, or said county pay any part of either principal or interest of the amount subscribed until said county should be fully and completely exonerated from the payment of the capital stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company.

VI.

In finding and adjudging that the county of Green had not been fully and completely exonerated from the payment of the capital

stock subscribed on behalf of said county to the Elizabethtown & Tennessee Railroad Company, by reason of the facts found to exist in the finding of fact.

VII.

In deciding and adjudging that the failure to recite in the bond the facts found by the Circuit Judge to be true, or any of the conditions upon which the bonds were issued was immaterial as against the defense that there was a failure to perform the said conditions.

VIII.

In adjudging that the plaintiffs in said cause were not entitled to recover the sums of money claimed in his petition or any part thereof.

JNO. G. SIMRALL,
Attorney for Plaintiffs in Error.

130 And on the 5th day of July, 1905, came the plaintiffs by John G. Simrall, their attorney and tendered their bond in the penalty of five hundred dollars, ($500.00), conditioned according to law with the American Surety Company of New York, as surety, which bond is now approved and ordered to be filed.

The appeal bond referred to is as follows:

Circuit Court of the United States, Western District of Kentucky.

JOHN THOMAS ET AL.
vs.
GREEN COUNTY.

Know all men by these presents, that we, John Thomas individually and as executor of Thos. P. Hendricks, Dillard Ricketts, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas and H. L. Breneman, the last two as executors of Brigg Swift, deceased, J. H. Kurtz, John Thomas, trustee for T. Hendricks, T. Hendricks and Sherley D. Murphy as principals and the American Surety Company of New York, as surety are held and firmly bound unto Green County, in the sum of five hundred dollars, to be paid to the said Green County, executors and administrators to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 3rd day of July, A. D. 1905.

Whereas, the above named John Thomas, individually
131 and as executor of Thos. P. Hendricks, Dillard Rickets, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas, and H. L. Breneman, the last two as executors of Brigg Swift, deceased, J. H. Kurtz, John Thomas, Trustee for T. Hendricks, T. Hendricks, and Sherley D. Murphy, hath, prosecuted a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, to reverse the judgment rendered in the above entitled suit, by the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

Now therefore the condition of this obligation is such, that if the above named John Thomas, individually and as executor of Thos. P. Hendricks, Dillard Rickets, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas, and H. L. Breneman, the last two as executors of Brig Swift, deceased, J. H. Kurtz, John Thomas, Trustee for T. Hendricks, T. Hendricks, and Sherley D. Murphy, shall prosecute their said writ of error, to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN THOMAS,
Individually and as Ex'tr, &c., and All the Plaintiffs Herein Named,
By JOHN G. SIMRALL, *Att'y.*
AMERICAN SURETY CO.
OF NEW YORK,
By ATTILLA COX,
Resident Vice-President.
SAMUEL K. BLAND,
Resident Assistant Secretary.

132 Taken and acknowledged before me this 3rd day of July, 1905.

[SEAL.] A. G. RONALD, *Clerk.*

Approved July 5, 1905.

WALTER EVANS, *Judge.*

And on the 27th day of July, 1905, came the plaintiffs in error by Ayres, Jones & Hollett their attorneys, and on their motion time is extended them to and including September 2nd, 1905, within which to file transcript of the record in this case in the United States Circuit Court of Appeals for the Sixth Circuit.

Circuit Court of the United States, Western District of Kentucky, *ss.*

I, A. G. Ronald, Clerk of the Circuit Court of the United States, for the Western District of Kentucky, at Louisville, Kentucky, do hereby certify that the foregoing 850 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as appears from the record and files in my said office.

Witness my hand and seal of said court this 25th of August, A. D., 1905.

A. G. RONALD, *Clerk.*

UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you or some of you, between John Thomas individually and as executor of Thos. P. Hendricks, Dillard Ricketts, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinnet, R. J.
133 Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas and H. L. Breneman, the last two as executors of Briggs Swift, deceased, J. H. Kurtz, John Thomas, Trustee for T. Hendricks, T. Hendricks and Sherley D. Murphy, plaintiffs *vs.* Green County, defendant, a manifest error hath happened to the great damage of the said John Thomas individually and as executor of Thos. P. Hendricks, Dillard Rickets, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Hasselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriet Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas and H. L. Breneman, the last two as executors of Briggs Swift, deceased, J. H. Kurtz, John

Thomas, Trustee for T. Hendricks, T. Hendricks and Sherley D. Murphy as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States — Court of Appeals for the Sixth Circuit together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 2nd day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

[SEAL.] A. G. RONALD,
Clerk of the Circuit Court of the United States
for the Western District of Kentucky.

Allowed by Walter Evans, Judge.

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*Not exceeding 30 days from the day of signing the citation.

134 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To Green County, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the* 2nd day of August next, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Kentucky, wherein John Thomas, individually and as executor of Thos. P. Hendricks, Dillard Rickets, George B. Yandes, John A. Kurtz, Helen M. Rockwood, and C. B. Parkman, the last two named persons as executors of W. O. Rockwood, deceased, William S. Hubbard, Aquilla Jones, C. B. Parkman, Thomas A. Hendricks, Wabash College, Indianapolis Rolling Mills Company, William Mansur, Meridian National Bank, A. R. Forsythe, J. N. Kinney, R. J. Bright, Brigg Swift, L. W. Haselman, Maria D. Leach, Charles D. Murphy, Jessie D. Wood, Helm R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C. Hendricks, Harriett Jones, Mrs. R. K. Lord, E. R. Forsythe, J. C. Thomas and H. L. Breneman, the last two as executors of Briggs Swift, deceased, J. H. Kurtz, John Thomas, Trustee for T. Hendricks, T. Hendricks, and Sherley D. Murphy are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

[SEAL.] WALTER EVANS, *Judge.*

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*Not exceeding 30 days from the day of signing.

Service accepted this July 7, 1905.

JOHN W. LEWIS,
ERNEST MACPHERSON,
Attorneys for Green County.

135 And afterwards to wit: on September 5, 1905, præcipe for appearance of Counsel was filed in said cause which reads and is as follows:—

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

THOMAS ET AL.
vs.
GREEN COUNTY.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as Counsel for the Plaintiff in Error.

AYRES, JONES & HOLLETT,
HUMPHREY, HINES & HUMPHREY.

And afterwards to wit on May 1, 1906, Affidavit of W. L. Doolan was filed in this cause and clothed in the words and figures as follows:

136 United States Circuit Court of Appeals for the Sixth Circuit.

STATE OF KENTUCKY, *County of Jefferson, set:*

Affiant, W. L. Doolan, says that John G. Simrall, who was, at the time of his death and for some years prior thereto, counsel for the plaintiff and petitioners in the case of Thomas, etc., against Green County, died on July 18th, 1905; that for several weeks prior to his death said Simrall was very sick and was either confined to his bed or room during that time.

Affiant says that shortly after the judgment was rendered in the above mentioned case, to-wit, June 1st, 1905, said Simrall was taken to French Lick, Indiana, to be treated for a severe attack of rheumatism from which he suffered, and says that on or about the 25th

day of June, 1905, said Simrall was brought upon a stretcher to the Galt House in Louisville, Kentucky, where he remained about two weeks.

Affiant says that while said Simrall was confined at the
137 Galt House in Louisville, Kentucky, he requested this affiant, who then, and for some years prior thereto, had an office with said Simrall, to bring to him the office file of papers in the above mentioned case, which affiant did.

Affiant says that said Simrall prepared therefrom the petition for a writ of error in the above mentioned case, and sent same to this affiant to be copied and filed in the United States Circuit Court at Louisville, Kentucky.

Affiant says that said petition was prepared by this affiant from the copy furnished by said Simrall and was by this affiant filed on June 30, 1905, in said Circuit Court.

Affiant says that at the instance of said Simrall he secured the execution, on July 3, 1905, of a bond for costs in the above mentioned case, and says that on July 5th, 1905, the Writ of Error in the above mentioned case was granted by the Court.

Affiant says that said Simrall, on or about said date, to wit, July 5th, was removed from said Galt House to his home at Anchorage, Kentucky, where, on July 18th, 1905, he died.

138 Affiant says that he made no personal examination or comparison of the petition for writ of error and pleadings in the above mentioned case, and that he was not of counsel in said case.

W. L. DOOLAN.

Subscribed and sworn to before me this April 17th, 1906, by W. L. Doolan. My commission expires January 24th, 1910.

F. O. WRIGHT,
Notary Public, Jefferson Co., Ky.

And afterwards to wit on May 1, 1906, motion to amend writ of error was filed in this cause and clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

JOHN THOMAS ET AL.
vs.
GREEN COUNTY.

Plaintiffs in a writ of error herein now move the Court to
139 amend the said writ of error so as to strike therefrom the following names, to-wit:

John Thomas, individually and as Executor of Thomas P. Hendricks, John Thomas, Trustee for T. Hendricks, T. Hendricks, Charles D. Murphy, A. R. Forsythe, E. R. Forsythe, Brigg Swift,

C. B. Parkman, C. B. Parkman and Helen M. Rockwood, Executors of W. O. Rockwood, deceased, Dillard Ricketts, Thomas A. Hendricks, and Eliza C. Hendricks.

And further move the Court so to amend the writ of error as to insert the name of Henry Knippenberg, Executor of John Thomas, deceased, in place of John Thomas; and Elizabeth W. Hasselman, Administratrix of L. W. Hasselman, deceased, in place of L. W. Hasselman; and Hannah A. Mansur and Charles W. Mansur in lieu of William Mansur; Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones and Emma J. Holloway, in lieu of Harriet Jones and Aquilla Jones; and David A. Myers, Administrator of A. R. Forsythe, in lieu of A. R. Forsythe;

140 So that the said writ of error as amended shall run in the name and in favor of Henry Knippenberg, Executor of John Thomas, deceased, Elizabeth W. Hasselman, Administratrix of L. W. Hasselman, deceased, David A. Myers, Administrator of A. R. Forsythe, Maria D. Leach, Sherley D. Murphy, Jessie D. Wood, Helen R. Edson, William E. Rockwood, Charles B. Rockwood, Mrs. R. K. Lord Wab*b*ash College, Meridian National Bank, Hannah A. Mansur, Charles W. Mansur, William S. Hubbard, George B. Yandes, Indianapolis Rolling Mill Co., J. N. Kinney, Richard J. Bright, John A. Kurtz, J. C. Thomas and H. L. Breneman (the last two as executors of Briggs Swift, deceased), Elisha P. Jones, John W. Jones, Benjamin F. Jones Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones, Emma J. Holloway (the last nine being the children of Harriet Jones, deceased);

And also to amend the citations in the same way, and also the bond, or as the Court may advise to allow the execution of a new bond.

141 And the plaintiffs in error also move the Court to advance this cause and certify in it to the Supreme Court of the United States the same questions which are so certified in the case of Mary Amis Quinlan *v.* Green County, No. 1440 in this Court.

HUMPHREY, HINES & HUMPHREY.
AYRES, JONES & HOLLETT.

And afterwards to wit on the 1st day of May, 1906, the affidavit of Ernest Macpherson was filed in said cause clothed in the words and figures, as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

JOHN THOMAS, Individually and as Executor of Thomas P. Hendricks, Deceased, etc.,
vs.
GREEN COUNTY, KENTUCKY.

The affiant, Ernest Macpherson, says he is one of the coun-
142 sel for the defendant in error in the above entitled cause and was so in the court below and that he is informed, believes and states that Mrs. Eliza C. Hendricks, once a party plaintiff in the court below and named in the writ of error herein as one of the plaintiffs in error, died more than a year before the judgment in the court below was rendered; and the affiant further says that before the judgment in the court below was rendered, this affiant, although the record, by some oversight, does not so show, suggested in open court in presence of three of the counsel for plaintiffs in error the death of said Eliza C. Hendricks.

ERNEST MACPHERSON.

Subscribed and sworn to before me by Ernest Macpherson, at Louisville, Kentucky, this 30th day of April, 1906.
My commission expires on the 11th day of January, 1908.

[SEAL.] BEN. J. JOHNSON,
Notary Public, Jefferson County, Ky.

143 And afterwards, towit on the 1st day of May, 1906, motion to dismiss writ of error was filed in this cause clothed in the words and figures, as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

JOHN THOMAS and Others
vs.
GREEN COUNTY, KENTUCKY.

Comes now the defendant in error, Green County, Kentucky, by its counsel appearing in that behalf and moves the Court to dismiss the writ of error herein because the judgment of the Circuit Court of the United States for the Western District of Kentucky to which the said writ purports to have been taken was against the plaintiffs jointly, and without a summons and severance only a part of the plaintiffs prosecuted the writ of error to said judgment and the following plaintiffs in the Court below did not join in the petition for the writ of error nor are they named in the said writ, viz:

Hannah A. Mansur and Charles W. Mansur, Henry Knip-
144 penberg, Executor of John Thomas, deceased, Elizabeth W. Hasselman, executrix of L. W. Hasselmanm deceased, Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones, Emma J. Holloway and David A. Myers, Administrator of the estate of A. R. Forsythe, deceased; and (2) because the following named persons, who are mentioned in the petition for the writ of error and in the writ, were never parties to this action, viz: John Thomas as Executor of Thomas P. Hendricks, Thomas A. Hendricks, C. B. Parkman, William Mansur and Briggs Swift; and, (3) because Eliza C. Hendricks, once a party to the action in the Court below and named as such in the petition for the writ of error and in the writ, died more than a year before the judgment rendered in the Court below and the action was never revived by her personal or real representatives; and, (4) because the counsel for plaintiffs in error has not filed with the Clerk of this Court within twenty-five
145 days after the filing of the printed copies of the record any brief as required by Rule 24 of this Court and plaintiffs in error, if such there be, are in default; and (5) Green County, Kentucky, defendant in error, also moves the Court to affirm the said judgment because plaintiffs in the Court below if not joint owners of the bonds and coupons sued on, had no right to sue jointly and the Court below was without jurisdiction of the action and the judgment dismissing the petition was proper.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel for Green County, Kentucky,
Defendant in Error.

And afterwards towit on May 1, 1906, an order was entered in said cause clothed in the words and figures, as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN THOMAS
vs.
GREEN COUNTY.

146 Motion by defendant in error to dismiss writ of error and motion to amend writ of error and certify to the Supreme Court of the United States the same questions herein as in the case of Quinlan *vs.* Green County, No. 1440 *and* were argued for defendant in error by Mr. Ernest Macpherson, and for the plaintiff in error by Mr. Alex. P. Humphrey and are submitted to the Court.

And afterwards towit on July 10, 1906, an order was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

JOHN THOMAS ET AL.
vs.
GREEN COUNTY.

This cause came on to be heard upon the motion of the defendant in error to dismiss the writ of error and upon the motion of the plaintiffs in error to amend the writ and citation and to amend the the bond or give a new one, and was argued by counsel.

147 On consideration whereof the motion of the defendant in error to dismiss the writ of error is denied.

The motion of the plaintiffs in error is granted with leave to amend the writ and citation and they are hereby amended by striking out of each the following names of such persons therein appearing as plaintiffs in error who are not parties to the suit, towit: John Thomas, individually and as Executor of Thomas P. Hendricks, John Thomas, Trustee for T. Hendricks, T. Hendricks, Charles D. Murphy, A. R. Forsythe, Briggs Swift, E. R. Forsythe, C. B. Parkman, C. B. Parkman and Helen M. Rockwood, Executor- of W. O. Rockwood, deceased, Dillard Ricketts, Thomas A. Hendricks and Eliza C. Hendricks; and by inserting in each the names of the omitted plaintiffs below, towit: Henry Knippenberg, Executor of John Thomas, deceased, in place of John Thomas; and Elizabeth W. Hasselman, Administratrix of L. W. Hasselman, deceased, in place of L. W. Hasselman; and Hannah A. Mansur and Charles W. Mansur in lieu of William Mansur; Elisha P. Jones, John

148 W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones and Emma J. Holloway, in lieu of Harriet Jones and Aquilla Jones; and David A. Myers Administrator of A. R. Forsythe, in lieu of A. R. Forsythe; and with leave to give a new bond and so that said writ of error and citation and bond shall run in the names of the following plaintiffs in error, viz: Henry Knippenberg, Executor of John Thomas, deceased, Elizabeth W. Hasselman, Administratrix of L. W. Hasselman, deceased, David A. Myers, Administrator of A. R. Forsythe, Maria D. Leach, Sherly D. Murphy, Jessie D. Wood, Helen R. Edson, William E. Rockwood, Charles B. Rockwood, Mrs. R. K. Lord, Wabash College, Meridian National Bank, Hannah A. Mansur, Charles W. Mansur, William S. Hubbard, George B. Yandes, Indianapolis Rolling Mill Co., Richard J. Bright, John A. Kurtz, J. C. Thomas and H. L. Breneman (the last two as executors of Briggs Swift, deceased), Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones, Emma J. Holloway (the last nine being the children of Harriet Jones, deceased).

149 It is further ordered that upon the substitution of another bond corresponding to the writ of error as amended that this case shall stand continued until the Supreme Court of the United

States shall answer the interrogatories propounded by this Court in the case of Quinlan *vs.* Green County, and that the time for filing briefs shall be extended until then.

And afterwards to wit on July 13, 1906, a bond was filed in this cause clothed in the words and figures as follows:

United States Circuit Court, Western District of Kentucky.

No. 1483.

JOHN THOMAS ET AL.
vs.
GREEN COUNTY.

Know all men by these presents, that we, Henry Knippenberg, Executor of John Thomas, deceased; Elizabeth W. Hasselman, Administratrix of L. W. Hasselman, deceased; David A. Myers,
150 Administrator of A. R. Forsythe; Maria D. Leach; Sherley D. Murphy; Jessie D. Wood; Helen R. Edson; William E. Rockwood; Charles B. Rockwood; Mrs. R. K. Lord; Wabash College; Meridian National Bank; Hannah A. Mansur; Charles W. Mansur; William S. Hubbard; George B. Yandes; Indianapolis Rolling Mill Co.; J. N. Kinney; Richard J. Bright; John A. Kurtz; J. C. Thomas and H. L. Breneman (the last two as Executors of Briggs Swift, deceased); Elisha P. Jones; John W. Jones; Benjamin F. Jones, Cora Jones; Aquilla Q. Jones; Edwin S. Jones; William M. Jones, Frederick Jones, Emma J. Holloway (the last nine being the children of Harriet Jones, deceased), as principals, and the American Surety Company of New York, as surety, are held and firmly bound unto Green County in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Green County, its successors and assigns, for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

151 Sealed with our seals and dated this July 11, A. D. 1906.

Whereas a writ of error was heretofore sued out in this cause and a bond executed in pursuance thereof but said writ of error and bond were informal and incorrect in failing to give accurately the names of the plaintiffs in error, and

Whereas, in the said cause as pending in the Circuit Court of Appeals for the Sixth Circuit, leave was given to amend the writ of error and it has been so amended, the same to be effective upon the execution of a bond, and

Whereas the above named principals have prosecuted and are now prosecuting a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, to reverse the judgment rendered in the above entitled suit by the Circuit Court of the United States for the Western District of Kentucky, at Louisville,

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ

of error to effect and answer all costs if they shall fail to
152 make good their plea, then this obligation shall be void;
otherwise the same shall be and remain in full force and
virtue.

HENRY KNIPPENBERG,
Executor, and All Others Above Named, Plaintiffs in Error,
By ALEX. P. HUMPHREY, *Atty.*
AMERICAN SURETY COMPANY OF NEW YORK,
By SAMUEL K. BLAND,
Resident Vice President.

Attest:
W. PRATT DALE,
Resident Ass't Sec'ty.

Extract from the Record of the Board of Trustees of the American Surety Company of New York.

"The regular quarterly meeting of the Board of Trustees of the American Surety Company of New York was held at the Company's office, No. 100 Broadway, in the City of New York, on Wednesday, January 17, 1906, at 12 o'clock noon.

* * * * * * *

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

153 "GENTLEMEN: The Committee appointed by the Executive Committee at their meeting held Wednesday, December 13, 1905, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *
Resident Vice Presidents at Louisville, Ky.:
Attilla Cox.
John W. Barr, Jr.
Thos. W. Bullitt.
Samuel K. Bland.
Resident Assistant Secretaries at Louisville, Ky.:
Samuel K. Bland.
W. Pratt Dale.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the afore-
154 mentioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record
155 and are set forth and contained in said record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and seal of the Company, at the city of New York, this February 5, 1906.

F. J. PARRY,
Assistant Secretary.

And afterwards to wit on the 23rd day of July, 1906, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

156 Filed Jul- 23, 1906. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1483.

JOHN THOMAS ET AL., Plaintiffs in Error,
vs.
GREEN COUNTY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted May 1, 1906; Decided July 10, 1906.

Before Lurton, Severens, and Richards, Circuit Judges.

Opinion by LURTON, *C. J.:*

This was an action by numerous persons as plaintiffs against Green county upon bonds, and coupons clipped therefrom, issued by that county, the plaintiffs averring that they were jointly the hold-

ers and owners of the bonds and coupons upon which the action was brought.

The county denied that they were such joint owners and denied liability upon the bonds and coupons upon several grounds not necessary to be now stated.

The issues were by stipulation submitted to the trial judge upon an agreed statement of facts, and there was a judgment against the plaintiffs and in favor of the defendant.

From this judgment certain of the plaintiffs have sued out this writ of error.

The defendant in error has entered a motion to dismiss the writ; first, because some of the persons named as plaintiffs below
157 have not joined as plaintiffs in error and have not been cut off by a summons and severance. Second, because certain persons are named as plaintiffs in error who were not parties below. Third, because one of the parties named as a plaintiff in error died more than a year before the judgment complained of and that the action was never revived by her representative. Fourth, because no brief has been filed, as required by Rule 24 of this court.

The plaintiffs in error meet the matter of the failure of all the plaintiffs to join in suing out the writ by a motion to amend the writ and citation, by inserting in each the names of the omitted plaintiffs below and to amend the bond or give another. They also move the court to strike from the writ and citation the names of such persons therein appearing as plaintiffs in error who were not parties to the suit.

The inclusion of persons as plaintiffs in error who were not parties to the suit is an error which may be corrected by dismissing the writ as to them or by striking their names out.

The motion to so strike out the names set out in the motion paper is accordingly allowed and an order will be so entered.

That persons not parties below were included as plaintiffs in error does not vitiate the writ as to those who were parties, such inclusion being of no effect.

"Surplusage does not vitiate that which in other respects is good and valid" is a maxim applicable to pleading as well as to other written instruments. Brown Legal Maxims, Star page 604.

The right to amend the writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment under Section 1005, R. S. *Estis v. Trabue*, 128 U. S. 226; *Walton v. Marietta Chair Co.*, 157 U. S. 342.

Thus in *Estis v. Trabue* the plaintiffs in error, as well as the defendant in error, were described only by the names of firms. The record disclosed the names composing the firms and an amendment inserting their names was allowed.

158 In *Walton v. Trabue* the plaintiff in error was described as administrator of a certain estate. The accompanying record showed that another person named therein claimed to have succeeded the person named as administrator, and that this other had tendered the bill of exceptions and given bond to prosecute the writ of error. The substitution was allowed.

In *Knickerbocker Life Ins. Co. v. Pendleton et als.*, 115 U. S. 339, the Supreme Court after final judgment discovered that the writ of error was sued out and citation directed and served against P. H. Pendleton, only one of the plaintiffs below; that the appeal bond was made to him alone; but that the supersedeas bond ran to all of the plaintiffs below and that all subsequent proceedings were entitled in the name of P. H. Pendleton, *et al.* After notice to plaintiff to show cause, the court allowed the writ of error to be amended, set aside the judgment, ordered a new citation to all the plaintiffs below and when same was served allowed a re-argument.

The test of the right to amend when some of the plaintiffs are not joined in a writ of error seems from the case cited to turn upon whether the omission to join them appears from the record to have been accidental. The accompanying record here shows that this was a suit by a large number of persons and corporations, who averred that they were joint owners of the bonds and coupons in suit.

The case lingered long before a hearing, and some of the plaintiffs died. The representatives of some of those who died were brought in by amended petitions and the suit revived in their names.

In one case it seems that the representative of a deceased plaintiff was not brought in.

If, in fact, the plaintiffs were joint owners of the bonds and coupons in suit, it would seem, under Section 957 R. S., that the suit might proceed in the name of the survivors upon the suggestion of the death upon the record and that the suit would not abate.

The question as to whether they were such joint owners is one of mixed fact and law and we pretermit the present determina-
159 tion of that question. For the purposes of the present motion we assume the fact to be as averred in the pleadings. Upon that premise it was unnecessary to revive in consequence of the death of any person named as plaintiff and the suit did not abate for want of such reviver.

That the persons who are now asked to be named by amendment as plaintiffs in error were plaintiffs below, appears from the accompanying record. That they were accidentally omitted as plaintiffs in error we are also satisfied from an examination of the record. Their omission seems accounted for by counsel preparing the petition for the writ inadvertently taking the names of the plaintiffs from a transcript of a record of another suit which was introduced in the court below as evidence upon a question of estoppel and from the omission to examine certain amendments to the pleadings bringing in new plaintiffs as representatives of deceased plaintiffs.

This confusion is explained by an affidavit of the counsel who filed the petition for the writ of error. This he did at the request of Mr. Simrall, who had represented the plaintiffs, from a memorandum which Mr. Simrall prepared from the office file while lying seriously ill from a sickness which shortly proved fatal.

The lawyer who prepared the writ of error papers was not of counsel, knew nothing of the case and used this memorandum alone as containing names of the plaintiffs. The circumstance that persons who appeared as plaintiffs in the transcript of a former suit

should be made plaintiffs in error in this suit although not parties plaintiff below and that persons who were parties plaintiff below should be omitted as plaintiffs in error here, not being parties to the record of the former suit in evidence, seems to make it plain that the memorandum of names to be made plaintiffs in error was made from this evidential transcript by inadvertence and to establish that the omission of the persons who now ask to join as plaintiffs in error was accidental and not intentional.

160 The motion to amend the writ and citation and to give a new bond will be allowed. The motion to dismiss the writ is denied.

The court takes judicial notice that there is pending on its calendar another suit which involves some of the series of bonds here in litigation, which case has already been argued. Important and doubtful questions of law upon which the liability of the defendant in error must turn in both cases have been certified to the Supreme Court.

It is therefore ordered that upon the amendment of the writ and citation according to the filed motion and the substitution of another bond that this case stand continued until the Supreme Court shall answer the interrogatories propounded in the other case and that time for filing briefs be extended until then.

161 And afterwards towit on the 8th day of October, 1907, an entry was made upon the journal of said Court clothed in the words and figures as follows:

JOHN THOMAS ET AL.
vs.
GREEN COUNTY, KENTUCKY.

This cause is argued by Mr. Alex P. Humphrey and Mr. Edmund F. Trabue for the Plaintiff in Error and by Mr. Ernest Macpherson for the Defendant in Error and is submitted to the Court.

And afterwards towit on the 15th day of February 1908 judgment was rendered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1483.

JOHN THOMAS ET AL.
vs.
GREEN COUNTY, KENTUCKY.

Error to the Circuit Court of the United States for the Western District of Kentucky.

162 This cause came on to be heard on the transcript of the record from the Circuit Court of The United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause be and the same is hereby reversed with costs and cause remanded with directions to the said Circuit Court that upon the suggestion on the record of the deaths of such of the original plaintiffs as have died pending the suit and striking out the names of their personal representatives, it enter judgment for the plaintiffs as they then appear of record, for the amount of the principal of the bonds in suit with interest thereon from the date when their latest coupons severally become due and for the coupons in suit with interest on each from the time when they severally fell due.

And afterwards towit on the 15th day of February, 1906, and opinion was filed in said cause, clothed in the words and figures as follows:

Opinion.

63 Filed Feb. 15, 1908. Frank O. Loveland, Clerk.

No. 1483.

United States Circuit Court of Appeals, Sixth Circuit.

JOHN THOMAS ET ALS., Plaintiffs in Error,
v.
GREEN COUNTY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Kentucky.

Submitted October 8, 1907; Decided Feb. 15, 1908.

Before Lurton, Severns and Richards, Circuit Judges.

SEVERNS, *Circuit Judge:*

This is an action against Green County, Kentucky, brought by other parties upon other bonds and coupons of the same issue as those which were the subject of the suit in *Quinlan v. Green County*, recently decided by this court. The cause was tried by the court without a jury, and the findings of fact and of law were the same in all material respects as in the other case. And unless there are some fatal defects in the procedure peculiar to this case and of which we are bound to take notice, the same judgment would be due.

The plaintiffs in the court below as well as the plaintiffs in this writ of error were and are quite numerous. They all claimed to be jointly interested in the bonds and coupons sued upon. In their amended petition they allege "that they are jointly the holders and owners of all the bonds and coupons" therein specified. If they were they might properly join as plaintiffs in the suit, and the

whole sum sued for would be that of juristicum, and not
164 the value of the interest of each. The rule is stated by Mr. Justice Bradley in *Clay v. Field*, 138 U. S., 464, 479. Some of the original plaintiffs were representatives of deceased persons who had formerly been owners of some interest in the bonds and coupons, and some have died pending the suit, and the suit has not been revived in the names of their representatives, if any have been appointed. And as to such plaintiffs, the defendant contends that the suit has abated. The facts of their deaths appear in the record. The original plaintiffs who have survived continued to be parties, and although at first not plaintiffs in this writ of error, have been made such by amendment, and the finding of the court below was that at the beginning of this suit "the plaintiffs were then the *bona fide* holders for value of the bonds and coupons sued on and were fully entitled to sue the defendant thereon in this court." In answer to the contention that the suit became defective and abated, it is urged that the plaintiffs were joint owners and holders of the title to the bonds and coupons, and that therefore upon the death of any of them the right of action devolved upon the survivors, and further that the presence of the names of the deceased persons in the record was wholly indifferent matter and is harmless. In respect to this last proposition, we so held on a motion to dismiss this writ, to be mentioned later.

Although the fact of the death of those plaintiffs was apparent upon the record there was no formal suggestion of it. Before the case came on for hearing in this court the defendant made a motion to dismiss the writ of error. The second and third grounds of the motion were "because certain persons named as plaintiffs in error were not parties below" and "because one of the parties named as a plaintiff in error died more than a year before the judgment complained of, and that the action was never revived by her representative." The plaintiffs in error made a counter motion for leave to amend the writ by inserting the names of the omitted plaintiffs below and to strike out the names of those plaintiffs in error who were not plaintiffs below. This motion was supported by affidavits showing that these mistakes were the result of accident. We
165 denied the motion to dismiss the writ and granted the motion to amend it for reasons stated in an opinion then handed down; 146 Fed. 487. In the course of that opinion we said:

"If in fact the plaintiffs were joint owners of the bonds and coupons in suit, it would seem, under section 956, Revised Statutes, that the suit might proceed in the name of the survivors upon the suggestion of the death upon the record, and that the suit would not abate. The question as to whether they were such joint owners is one of mixed fact and law, and we pretermit the present determination of that question. For the purposes of the present motion, we assume the fact to be as averred in the pleadings."

It is now contended that the plaintiffs were not joint owners, because as matter of law they could not be such. This contention is grounded upon the fact that several of the plaintiffs are corporations, Wabash College, Indianapolis Rolling Mills Company, Meridian National Bank, and could not therefore be "joint tenants" with

natural persons, and 5 Bacon's Abridgement 240, Co. Litt 296, and *Telfair v. Howe,* 3 Richardson's Eq. 235, are cited. This doctrine had its root in the common law relating to joint tenancies of real property as affected by the law of descents and of survivorship in joint tenancies, and we should have supposed that the rule had application only to real estate wherein alone the peculiar character of joint tenancy exists. But it was held in the South Carolina case that it applied also to a joint estate in personal property. That was a case where there was nominally a bequest to two incorporated religious societies, one of which was found to be non-existent. And the question was whether the other was entitled to the whole of the bequest by virtue of the *jus accrescendi* or whether a moiety was distributable to the next of kin. The court held upon the analogy of the rule in case of joint tenancies that such an estate was not created and that the existing society took only one moiety as a separate estate upon the similitude of a tenancy in common. And it was shown in the passage cited from Lord Coke that in the case of a devise to two bishops, although they could not take as joint tenants, yet that they would take as tenants in common. This con-
166 clusion was the foundation of the decree of the South Carolina court; for if no estate at all was vested in the existing society the decree would not have been justified; and Ch. Dunkin, whose decree was affirmed said that "the joint words used in this bequest must, therefore, be construed to make several estates." Now, we can not think that two or more owners of undivided interests in a negotiable note or bond endorsed to them, or payable to them as the bearers, sustain toward each other any such relation as joint tenants of real property at the common law. Their position is more nearly that of tenants in common, and in Indiana, where the holders of these bonds resided, there is a statute which provides that "The survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common, unless otherwise expressed in the instrument." Section 8136 Ind. Stat., Revision of 1894. Other states have similar statutes, and in still others it is a rule of the common law. If this be so, there can be no doubt, upon any authority, that a corporation may be one of several joint endorsees or bearers of a negotiable instrument, using the term "joint" in its general sense and not in the restricted sense when applied to a tenancy of real property, and it may sue thereon as one of several co-obligees joined as plaintiffs. Upon the death of a joint obligee the right to maintain the action survives to his co-obligee; and all such survivors must join in a suit at law on the obligation. It would be erroneous to join the personal representative of the deceased. *Jackson v. The People,* 6 Mich. 154. And if one dies pending an action the suit may be prosecuted in the name of the survivor, and if he recovers, he recovers the whole sum due on the obligation, and thereupon he holds that part of the recovery which represents the interest of his deceased co-obligee in trust for those entitled to have it. The obligor has no concern with the proportions in which the recovery is distributed; that is a matter entirely between the other parties, the surviving plaintiff and the

representatives. The cause of action is entire and can not be split up. And the defendant is protected by the judgment. The right to maintain the action on a negotiable instrument and the ultimate disposition of the proceeds are different
167 things, and statutes which protect the interests of deceased tenants in common and practice codes which require the action to be brought in the names of parties in interest have not confounded the distinction. *Morrison v. Winn*, Hardin (Ky.) 480; *Brown v. King*, 6 Litt. (Ky.) 462; *McIntosh v. Zaring*, 150 Ind. 309; *Webster v. King's Co. Trust Co.*, 145 N. Y. 275; *Sessions v. Peay*, 19 Ark. 267; Pomeroy, Code Rem. Section 143, 4th Ed. These and other authorities would seem to show that the personal representatives of deceased plaintiffs were not necessary or even proper parties to the action. *Donnell v. Manson*, 98 Mass. 576. *Jackson v. The People, supra.* But as their presence has harmed no one, *Quinlan v. Neville*, 152 Fed., 879, 883; 81 C. C. A. 673, 677, we think the formal error may be corrected by direction to the court below. If a survivor of several obligees may maintain an action without joining the representatives of a deceased co-obligee, as must be conceded, it is difficult to see why he might not continue an action after the death of a co-plaintiff, the result of the action being precisely the same. It is obvious that the revivor is a matter of form only. As a matter of procedure it is usual to suggest the death of the co-plaintiff and obtain an order that the cause proceed in the name of the survivor. In the several states there are generally statutes indicating such a procedure. The Civil Code of Kentucky, Section 500, provides that, "if the right of action survive to or against the remaining parties, the action may proceed without revivor, after statement on the record of such death or cessation of power;" and Section 507 provides that "an order to revive an action in the name of the representative or a successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time when the order might have been made." The last section is one which seems applicable to the death of a sole plaintiff; and the former to the death of one of several; and is substantially identical with Section 956 of the Revised Statutes of the United States. In the latter case, that is, when one of several plaintiffs dies, no revivor is necessary. A statement on the record is sufficient. Doubtless such pro-
168 visions in state statutes are to be observed in suits in federal courts except when Section 956, Revised Statutes United States, applies. Nevertheless, the failure to observe them in a case where there are surviving plaintiffs does not defeat the jurisdiction. If the defendant permits the suit to go on as if a formal entry had been made, and secures a judgment in his favor on the merits, which it is still defending, we think the objection can not be made on a writ of error sued out by the other party. *Wetzel &c. Co. v. Travis Bros. & Co.* 75 C. C. A. 266. *Wilhite v. Skelton*, 78 C. C. A. 635. *Swift v. Donahue*, 104 Ky. 137. *J. Newnham v. Law*, 4 Term R. 577, *Cozens v. Long*, 3 N. Y. L. 331, 338; *Stoetzell v. Fullerton*, 44 Ill. 108; *Butler v. Lawson*, 72 Mo., 227. The case is not

like that of the death of a sole plaintiff, which necessarily puts a stop to the proceedings until a new plaintiff is made. As we have stated, the fact that some of the plaintiffs were dead was apparent from the record and from this it appears that counsel for defendant did not regard a formal entry as material. The right to proceed with the suit is absolute, and the statement of the death a matter of form, which may be waived by a failure to make seasonable objection or, if objection be made, by stipulating to go to trial on the merits and taking the chances of a judgment as was done here. Said Bigelow, Judge, in *Fox v. Harding*, 7 Cush., 520, "So too in judicial proceedings for the furtherance of public justice, and the discouragement of dilatory pleas and technical objections, parties who do not seasonably avail themselves of their legal rights, are held by the courts to have conclusively waived them." And see *Frisbee v. United States*, 157 U. S. 160; *Thomas v. Wooldridge*, 23 Wal. 283; *Campbell v. Haverhill*, 155 U. S. 610. Objections to the jurisdiction are fundamental and can not be waived. But short of that most objections may be waived, and this may be done by the conduct of the party in not insisting upon a formality which he had a legal right to have observed.

It is true that on the 14th day of March, 1904, defendant's counsel moved for "a rule on the surviving plaintiffs named in the petition and amended petitions herein to furnish the dates of the deaths of the parties plaintiffs named in said pleadings who have
169 died since the institution of this action, and to show cause why this action should not be dismissed for failure to revive within the times prescribed by law." The court made no order in that behalf but the plaintiffs in response to the rule proposed stated that they had "no knowledge of the death of any of the plaintiffs except such as shown in the record herein, and the action has been revived in the names of their proper personal representatives," and they insisted that no revivor was necessary. This response was sworn to by the plaintiff's attorney. The defendant tendered no issue on this response, or proof to the contrary. On November 7, 1904, the court overruled the motion for the rule. And on March 22, 1905, the parties stipulated that the record of the case of *Quinlan v. Green County* should be treated and read in this case so far as applicable on the motion to dismiss and on the merits of the case that day submitted; and, second, that "the issues of fact in this case may be tried and determined by the court without the intervention of a jury, a jury being hereby waived." And the court made the same finding in respect to the facts and the same conclusions of law as in the Quinlan case. Thereupon the court entered judgment for the defendant as above stated. The objection is a dilatory one, not affecting the merits and as in the case of a plea in abatement, the objection should have been distinctly pointed out. The ground for the motion to dismiss was because of the "failure to revive within the time prescribed by law." It is not stated what law is referred to, but we infer that it was the law limiting the right to revive in the case of a sole plaintiff to one year, for that is the case in which the law prescribes that limitation. That law had no application to the

death of one or more of several plaintiffs. In the latter case there was no such limitation; and as we elsewhere point out, no such revivor was required by the Statute of Kentucky. Nor is it required by the Statute of the United States. This was not an objection that no statement of the death of parties had been entered on the record. It was not a motion which the court could have properly granted. Moreover, we think that if it appeared in the record, either upon the suggestion of the plaintiffs or defendant that some of the plaintiffs were dead, the requirement of Section 956 of the Revised
170 Statutes, which we incline to think govern- the case, was substantially fulfilled; or if it was not, we might direct, on remanding the case, that upon the making of the proper suggestion and striking out the names of personal representatives, the judgment be affirmed. And for the sake of form we will so order.

Some of the personal representatives were appointed by probate courts in another state than Kentucky. The statute of that state also provides that a personal representative of a foreign state may sue in the courts of Kentucky upon giving a bond for costs. But it was held by the Court of Appeals that the giving the bond was waived by not demanding it; *Swift v. Donahue*, 104 Ky. 137. In the earlier case of *Marrett v. Babb*, 91 Ky. 93, cited by defendant in error, there was a demurrer to the petition which we suppose (though this is not clear) raised the question of the status of the plaintiff. At all events the case of *Swift v. Donahue* is the latest decision and must be taken as the law of Kentucky. But all this is immaterial if, as we think, the right of action survived to the survivors.

There are no other questions which merit consideration. The conclusion must be that the judgment should be reversed, with direction that upon the correction of the record as above stated, it enter a judgment for the plaintiffs as they then appear of record, for the amount of the principal of the bonds in suit with interest thereon from the date when their latest coupons severally became due and for the coupons in suit with interest on each from the time when they severally fell due.

LURTON, *Circuit Judge*, dissenting, said:

I dissent from the opinion and judgment in this case for the reasons stated in my dissent in *Quinlan v. Green County*. Every one of the objections to the judgment in that case apply here, including particularly the direction for a judgment upon the bonds in suit and upon the coupons sued upon. I think a new trial should be directed if the judgment in favor of the County is reversed, because the findings are not definite enough to justify and do not cover all the issues presented by the county. Neither do I agree that the plaintiffs were joint tenants of the bonds and coupons
171 in suit. Joint tenancies are regarded with little favor and in cases of doubt the construction favored is that the parties were tenants in common. See the authorities cited in 23 Cyc. 485. By statute in many of the states joint tenancies have been legislated against and in the state of Indiana, where the owners of these bonds

resided, and where their alleged joint tenancy was created, it is provided that "the survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common unless otherwise expressed in the instrument." The same statute, in substance, exists in Kentucky. The effect of this Indiana statute is to abolish survivorship unless otherwise provided for. This is the practical concession of the majority for, upon that ground, they say, that a corporation may be a joint tenant with natural persons, a thing unknown at the common law. There was no agreement in respect to survivorship. Therefore this suit must abate as to deceased persons where there has been no revival. The distinguishing feature of a joint tenancy is that the tenants hold by one title and one right. Then the survivors take the whole title and right. In such a tenancy there need be no revivor in the name of the representative of a deceased joint tenant. And so Section 956, R. S., provides that a suit started in the name of a number of joint tenants shall not abate by the death of one, but that upon "the death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff."

Under the regulation of the practice by statute there was no authority to proceed with the case by making a finding of facts until there was placed upon the record a suggestion of the death of such of the original joint tenants as had died, and the county of Green ought not to be concluded by a finding of facts made without compliance with this practice. In view of the fact that these findings do not cover some of the issues made by the defendant below, and are vague and insufficient in others, I think it a great injustice that a new trial is not awarded instead of a *pro*-emptory direction for a judgment against the county in opposition to the judgment for the county made by the trial judge.

172 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the records and proceedings in the case of John Thomas, *et al., vs.* Green County, Kentucky, No. 1483, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 17th day of March, A. D. 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

173 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Henry Knippenberg, Executor of John Thomas, deceased, *et al.*, are plaintiffs in error, and Green County, Kentucky, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
174 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of May, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals, Sixth Circuit, *ss:*

I, Frank O. Loveland, Clerk of the Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court. In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 9th day of May, 1908, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

"United States Circuit Court of Appeals for the Sixth Circuit.

1483.

JOHN THOMAS'S EXECUTOR, HENRY KNIPPENBURG ET AL., Plaintiffs in Error,
vs.
GREEN COUNTY, KENTUCKY, Defendant in Error.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the

petition for the writ of certiorari, be taken as a return to said writ, dated the 6th day of May, 1908.

ALEX. P. HUMPHREY,
Counsel for John Thomas's Executor,
Henry Knippenburg et al.
ERNEST MACPHERSON,
Counsel for Green County, Kentucky.

Dated the 8th day of May, 1908.

I further certify that the above is a true and correct copy of the said stipulation and of the whole thereof.

Witness my official seal and signature and the seal of the said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said Circuit this 20th day of May, 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals, Sixth Circuit.

175 [Endorsed:] File No. 21,118. Supreme Court of the United States. No. 715, October Term, 1907. Green County, Kentucky, *vs.* John Thomas' Executor, Henry Knippenberg *et al.* Writ of Certiorari. Filed May 9, 1908. Frank O. Loveland, Clerk.

176 [Endorsed:] File No. 21,118. Supreme Court U. S. October Term, 1908. Term No. 352. Green County, Kentucky, *vs.* John Thomas' Executor, Henry Knippenberg *et al.* Writ of certiorari and return. Filed May 22d, 1908.

Supreme Court, U. S.
FILED.
APR 16 1908
JAMES H. McKENNEY,
CLERK

352.

Supreme Court of the United States

OCTOBER TERM, 1907.

GREEN COUNTY, KENTUCKY, . . Petitioner,

versus

JOHN THOMAS' Executor,
HENRY KNIPPENBERG, et al, } . . Respondents.

PETITION FOR CERTIORARI.

ERNEST MACPHERSON,
For Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS.

SIXTH CIRCUIT.

October Term, 1907.

John Thomas and others, *plaintiffs in error*,
vs.
Green County, Kentucky, *defendant in error*.
} Notice.

Plaintiffs in error are hereby notified that defendant in error will, on Monday, the 27th day of April, 1908, upon its verified petition and a copy of the entire record in this cause at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol in the city of Washington, D. C., for a writ of certiorari or other process addressed to the United States Circuit Court of Appeals for the Sixth Circuit and commanding it to certify to the Supreme Court for its review and determination the record in this case.

ERNEST MACPHERSON,
Counsel for Defendant, Green County.

The foregoing notice is hereby accepted, and delivery of the copy thereof and of the motion and of the petition for the writ of certiorari and brief in support of the petition are hereby acknowledged, this the 14th day of April, 1908.

ALEXANDER P. HUMPHREY,
Counsel for Plaintiffs in Error.

THE SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

Green County, Kentucky, *petitioner*,
vs.
John Thomas' executor,
Henry Knippenberg *et al.*, *respondents*.
} Motion.

Comes now Green County, Kentucky, by Ernest Macpherson, its counsel, and moves this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the respondents, John Thomas' executor, Henry Knippenberg, and others were plaintiffs in error, and your petitioner, Green County, Kentucky, was defendant in error, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ERNEST MACPHERSON,

Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

Green County, Kentucky, *petitioner*,

vs.

John Thomas' Executor, Henry Knippenberg; Elizabeth W. Hasselman, Admx. of L. W. Hasselman, deceased; David A. Myers, Admr. of A. R. Forsythe; Maria D. Leach, Sherly D. Murphy, Jessie D. Wood, Helen R. Edson, William E. Rockwood, Charles B. Rockwood, Mrs. R. K. Lord, Wabash College, Meridian National Bank, Hannah A. Mansur, Charles W. Mansur, Wm. S. Hubbard, George B. Yandes, Indianapolis Rolling Mill Company, J. N. Kinney, Richard J. Bright, John A. Kurtz, J. C. Thoms, H. L. Breneman (the last two as executors of Briggs Swift, deceased), Elisha P. Jones, John W. Jones, Benjamin F. Jones, Cora Jones, Aquilla Q. Jones, Edwin S. Jones, William M. Jones, Frederick Jones and Emma J. Holloway, *respondents*. } Petition.

Petition for the writ of certiorari requiring the United States Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court of the United States, for its review and determination, the writ of error taken by John Thomas' executor, Henry Knippenberg, and others against Green County, Kentucky.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Green County, Kentucky, respectfully represents as follows:

I.

John Thomas and others, including corporations, citizens of Indiana, claiming to be joint owners of bonds and coupons purporting to have been issued by your petitioner, Green County, brought suit against it on such bonds and coupons in the United States Circuit Court for the then District of Kentucky.

The bonds and coupons and interest amount to the sum of over one hundred thousand dollars and are of the same issues as those involved in the suit of Quinlan's Executrix v. Green County, in which a writ of certiorari is also applied for in this Honorable Court.

The case was tried without a jury, and the court found the same facts as in the Quinlan case. The court made no finding on various meritorious defenses presented by Green County, but dismissed the petition.

II.

The case was then taken to the United States Circuit Court of Appeals for the Sixth Circuit. Your petitioner thereupon in that court moved to dismiss the writ of error, as the plaintiffs named therein claimed to be joint owners and there had been no summons and severance, and as there were persons named as plaintiffs in the writ who had never been parties to the suit in the circuit court, and that some of the parties to the suit in the circuit court had not joined in the writ. The motion was overruled (Thomas and Others

v. Green County, 77 C. C. A., 487), and the writ was allowed to be amended, although the court reserved the question whether the plaintiffs in error were joint owners.

III.

The case was afterwards heard with that of Quinlan, Executrix, v. Green County, on October 8, 1907, and over four months thereafter, on February 15, 1908, the Circuit Court of Appeals (Circuit Judge Lurton dissented in writing) filed an opinion and reversed the judgment of the circuit court and directed judgment against your petitioner on all the bonds and coupons sued on.

IV.

The opinion of the majority of the Court of Appeals referred to their opinion in Quinlan's Executrix v. Green County, and then dealt only with the questions peculiar to the Thomas case. (1) On the reserved question of joint ownership the court ruled that the three corporations named among the plaintiffs—that is, Wabash College, Meridian National Bank and Indianapolis Rolling Mills Company—could be, and were, joint tenants or owners with natural persons. This was a novel ruling, and your petitioner submits that it is not sustained by any authority, and that as matter of law a corporation can not be a joint owner with right of survivorship with a natural person. (2) Your petitioner denied the allegations of the plaintiffs in their petition in the circuit court that they were joint owners of the bonds and coupons sued on, and propounded interrogatories to those plaintiffs requiring them to state the nature of their joint ownership. Their sworn answers

in the record disclosed that, though claiming to be joint owners, they each owned separate and distinct interests in the bonds and coupons sued on, and in some cases their interests were less than the amount requisite to give jurisdiction of their claims to the circuit court. (3) The record discloses that some of the plaintiffs in the circuit court—to mention three, John Thomas, L. W. Hasselman and Harriet Jones—died during the pendency of the action, and although a revivor was sought, the effort was not made in time, and no revivors were ordered. The Civil Code of Kentucky, section 509, declares that "an order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made." Your petitioner denied the facts essential to authorize a revivor, and the burden was on the plaintiffs, and the circuit court, though not directly finding as to these facts, by dismissing the petition, in legal effect decided against the plaintiffs in the circuit court on the questions of joint ownership and of right to revive.

> "The silence of a special finding as to a fact is equivalent to a finding against the party having the burden of proof."
>
> United States v. Harris, 77 Fed., 821.

> "When a special verdict or finding is rendered it behooves the party on whom is the burden of proof to see to it that every fact essential to the relief he seeks is directly and unequivocably stated."
>
> Snead v. Sabinal Mining & Milling Co., 20 C. C. A., 231.

It is submitted also that on this ground alone the Circuit Court of Appeals should have affirmed the judgment of the circuit court.

V.

The suit abated in the circuit court by deaths of owners of over one-third of the bonds and coupons, and no revivor having been had, it was error for the Court of Appeals to order judgment on such interests.

VI.

The bonds and coupons in this case were originally delivered by the Cumberland & Ohio Railroad to the Indianapolis Rolling Mill Company for railroad iron. The circuit court found as a fact that this iron was not used in Green County. It thus appears that no part of the proceeds even of the bonds or coupons in this case were ever expended within Green County, and that from them your petitioner never received any value whatever.

VII.

The questions as to the validity and enforcibility of the bonds and coupons presented in the Quinlan case are also involved herein.

In view of the amount in controversy and of the disastrous effect upon your petitioner of the judgment ordered by the Circuit Court of Appeals, and of the novelty and importance of the questions presented and of the division of opinion of the four Federal judges who have passed upon the case, your petitioner conceives that this is a proper case for review and determination by this Honorable Court.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, entitled in that court John Thomas and Others, plaintiffs in error, v. Green County, Kentucky, defendant in error, No. 1483, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner should have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

GREEN COUNTY, KENTUCKY,
By ERNEST MACPHERSON, *Counsel.*

Commonwealth of Kentucky,
County of Jefferson. } *ss.*

Ernest Macpherson, being duly sworn, says he is of counsel for Green County, Kentucky, the petitioner; that he prepared the foregoing petition, and that the allegations therein are true, as he verily believes.

ERNEST MACPHERSON.

Subscribed and sworn to by Ernest Macpherson before me this 14th day of April, 1908. My commission expires February 12, 1910. GEORGE A. BRENT,

(SEAL) *Notary Public, Jefferson County, Ky.*

SUPREME COURT OF THE UNITED STATES.

Green County, Kentucky, *petitioner*,
vs.
John Thomas' Executor,
Henry Knippenberg, *et al.*, *respondents*.

Brief in support of Petition.

I.

It appears from the answers to the interrogatories made in the circuit court by the respondents that the bonds and coupons herein sued on were obtained by the Indianapolis Rolling Mills Company from the Cumberland & Ohio Railroad; that thereafter the Rolling Mills Company declared a dividend of these bonds. This made the ownership by the stockholders separate and distinct as to each. It was claimed in the circuit court that the plaintiffs therein were joint owners of these bonds by an agreement made subsequently to the declaration of the dividend.

The circuit court made no finding of fact as to whether the ownership of the bonds was joint or in common. Finding 1 reads:

> "The court finds that all the plaintiffs are citizens of other States than Kentucky, and were so when this action was instituted on the 29th day of August, 1894, and that the plaintiffs were *then* the *bona fide* holders for value of the bonds and coupons sued on, and fully entitled to sue the defendants thereon in this court."

This finding was in response to defendant's plea that the plaintiffs were not the owners at all of the bonds. It did not find that the plaintiffs were joint owners. It did not find that the interests of the plaintiffs who had died survived to the others. The finding merely expressed the status of the parties at the time they brought suit and was perfectly consistent with the theory that they were common owners of the bonds on the 29th of August, 1894, or individual owners, and if any one died thereafter that his interest went to his heirs or representatives. The truth is, that the Circuit Judge made no findings on these questions, as he was deciding for the defendant, and apart from facts found by him regarded all else as immaterial.

II.

The judgment of the Circuit Court of Appeals necessarily proceeded on the theory that the plaintiffs in error were joint owners with right of survivorship. Cyc., vol. 23, p. 484, states that

> "the essential difference between joint tenants and tenants in common is that joint tenants hold the property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights. They also differ in that the right of survivorship exists in case of joint tenancy, but not in tenancy in common."

The respondents, plaintiffs in error, could not have been joint tenants, for Cyc., at same page, says:

> "As a general rule, all natural persons are capable of becoming joint tenants, but bodies politic or

> corporations can not be joint tenants either between themselves or with natural persons."

To the same effect is Thompson on Corporations, vol. 5, sec. 5793, which states that

> "A corporation can not take an estate in joint tenancy either jointly with another corporation or with a natural person."

In the case of Telfair v. Howe, 3 Rich. Eq. (S. C.), Am. Dec., 637, it is said:

> "I doubt very much if a single case, either English or American, can be adduced where a corporation or body politic has been held to be seized or possessed of an estate in joint tenancy."

Three of the respondents were corporations.

As the record shows that the respondents obtained their interests at different times and in different ways, some by descent and some by purchase, they could not have been joint tenants or owners, as "there must be in such an estate unity of interest, unity of title, unity of time, and unity of possession." 17 A. & E. Ency. of Law, 649. See also Cyc., vol. 23, p. 484.

III.

Both by the laws of Kentucky, the forum, and of Indiana, where the alleged contract of joint ownership was made, joint tenancies have been abolished. Ind. Rev. St., sec, 8136 reads:

> "The survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common, unless otherwise expressed in the instrument."

Kentucky Statutes, sec. 2348, reads:

> "Joint tenants may be compelled to make partition, and when a joint tenant dies, his part of the joint estate, real or personal, shall descend to his heir, or pass by devise, or go to his personal representative, subject to debts, courtesy, dower or distribution."

The contract of ownership herein did not provide for survivorship.

IV.

During the ten years or more the case was pending in the circuit court several of the original plaintiffs died. There was never any revivor as to any of these decedents, and the suit as to them abated and their interests went to their heirs or representatives. It is said, in 18 Encyclopædia of Pleading and Practice, 1124:

> "As a general rule, in all cases where the representatives of a deceased complainant are not made parties, according to the statutory provision, within the prescribed time after the suggestion of the death, *the suit will abate as to the deceased party and the interest of his representatives therein*, and the cause will proceed in favor of and against the survivors."

Therefore, if the judgment of the circuit court should

have been reversed, the Circuit Court of Appeals simply should have directed judgment only for the surviving plaintiffs, if at all. This would have saved the county bonds, face value, belonging to the Thomas estate, $10,500; the Hendricks estate, $1,800; the Hasselman estate, $500; Harriet Jones' estate, $1,400, and A. R. Forsythe's estate, $100; in all, $14,200, which, with coupons and interest, exceed one-third of the bonds sued on.

V.

Green County, Kentucky, never waived any of its rights to require a revivor, as one consideration will show. In its first answer filed in the case it denied that the plaintiffs were joint owners or holders of the bonds. This issue could not be decided until the final submission of the case, and until it was decided the defendant could not require a revivor as to any plaintiffs who died pending the action, for if the plaintiffs were joint tenants and the right of one dying passed to the other, no revivor was necessary. As to Thomas, Hasselman and Mrs. Jones, it was sought to revive by an amended petition alleging that they had died within one year prior to the time of filing the amended pleading. This was denied by Green County, which distinctly put in issue the facts essential to authorize such a proceeding, and the record shows that the allegation of the plaintiffs' pleading was not true.

VI.

Green County also contends that the record shows that the parties plaintiff in the circuit court merely clubbed together in order that all might sue in one case, as the

amount of the bonds owned by several of the plaintiffs was less than that required to give jurisdiction to a Federal court, and that as the Circuit Judge made no finding on this point, his judgment dismissing the petition should have been affirmed by the Circuit Court of Appeals under the authority of Williams v. Nottawa, 14 Otto, 209.

VII.

It is required by the laws of Kentucky, Marret v. Babb's Exor., 91 Ky., 93, and also by the Federal laws, Johnson v. Powers, 113 U. S., 156, that foreign representatives shall give bonds required by the local laws. These bonds were not given by the representatives, except one, in the circuit court, and for this reason the judgment of the circuit court was right dismissing the petition and should have been affirmed.

In the opinion of the majority of the Circuit Court of Appeals it is stated that

> "some of the personal representatives were appointed by probate courts in another State than Kentucky. The statute of that State also provides that a personal representative of a foreign State may sue in the courts of Kentucky upon giving a bond for costs. But it was held by the Court of Appeals that the giving the bond was waived by not demanding it. Swift v. Donahue, 104 Ky., 137."

This is true, but a special demurrer was promptly filed in the case as to certain foreign representatives, and as to Thomas', Hasselman's and Jones' representatives, they

could not be required to give bond, as they were never parties to the suit in the circuit court. There was no waiver in this case.

VIII.

If a suit such as this can be sustained in a Federal court, then it is possible for non-resident bondholders owning claims less than necessary to give jurisdiction to a Federal court merely to club together and call themselves joint owners or owners in common and nullify the act of Congress in relation to collusive suits.

IX.

The respondents were not joint obligees and therefore entitled to continue an action after the death of any obligee. The bonds herein involved were never made payable to two or more persons. Each was a separate obligation and the bonds were owned by distinct persons.

It is respectfully submitted that the case is one which ought to be reviewed.

ERNEST MACPHERSON,
For Petitioner.

Office Supreme Court, U. S.
FILED.
APR 24 1908
JAMES H. McKENNEY,
CLERK.

352.

Supreme Court of the United States.

OCTOBER TERM, 1907.

GREEN COUNTY, - - - - - - - Petitioner,

vs.

JOHN THOMAS, ETC., - - - - - Respondents.

BRIEF FOR RESPONDENTS ON APPLICATION FOR CERTIORARI.

ALEXANDER POPE HUMPHREY,
For Respondents.

F. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1907.
No. 715.

GREEN COUNTY, - - - - - - - - *Petitioner,*

vs. APPLICATION FOR CERTIORARI.

JOHN THOMAS, ETC., - - - - - - - *Respondents.*

BRIEF FOR RESPONDENTS.

This is an application for *certiorari* to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the case of John Thomas and others, Plaintiffs in Error, v. Green County, Defendant in Error. It is in many respects a companion case to that of Quinlan v. Green County, in which also there is an application for a *certiorari.*

John Thomas and a large number of other persons brought suit in the United States Circuit Court for the District of Kentucky against Green County, the cause of action being certain negotiable bonds and coupons theretofore issued by that county. The plaintiffs alleged that they were the joint owners of all of the bonds in suit. It appears that these bonds had been issued by Green

County some years before, and had been given to the Indianapolis Rolling Mill Company in payment for railroad iron delivered to the railroad in whose favor Green County had made a subscription to stock and to which Green County had, in payment of such subscription, delivered these bonds. It can not be denied that the plaintiffs were purchasers for value, they having received these bonds from the Indianapolis Rolling Mill Company as a dividend. The plaintiffs alleged both in their petition and amended petition that they were the joint owners of these bonds. The terms of the contract under which they became joint owners were not in the record. In the Circuit Court there was a waiver of jury and a submission of the law and facts to the court. The court made a special finding, and upon such special finding entered a judgment in favor of Green County. This finding, among other things, recited that the plaintiffs were then "the bona fide holders for value of the bonds and coupons sued on, and were fully entitled to sue the defendant thereon in this court."

A writ of error was prosecuted from this judgment to the Circuit Court of Appeals for the Sixth Circuit. When the case got there the defendant in error, Green County, moved to dismiss the writ of error because certain persons were united in the writ of error who were not parties to the suit, and certain persons were not joined in the writ of error who were parties to the suit. The history of this motion and the determination of the court upon it are set out in Thomas v. Green County, 146 Federal Reporter, 969. The reason for the mistake in the names of the parties in the writ of error is fully explained at page 971. It is sufficient to say that the Circuit Court of Appeals overruled the motion to dismiss the writ of

error, and sustained the motion to amend the writ and citation. This was done. It happened, however, that the case of Quinlan v. Green County had already been argued in the Circuit Court of Appeals and certain questions common to that case and the Thomas case certified to this court; and thereupon, as appears in 146 Federal Reporter, 972, it was ordered, "upon the amendment of the writ and citation according to the filed motion, and the substitution of another bond, that this case stand continued until the Supreme Court shall answer the interrogatories propounded in the other case, and that time for filing briefs be extended until then."

This court having answered the interrogatories in the Quinlan case, that case and the Thomas case were reargued in the Circuit Court of Appeals. In the Thomas case, however, the defendant in error further pressed the motion to dismiss, and raised certain questions of want of revivor. These latter questions were fully briefed by counsel on both sides, and we may say every industry was used to find all of the precedents upon the questions of practice thus raised. The Circuit Court of Appeals reversed the Quinlan case and remanded it with directions to enter a judgment in favor of Quinlan. At a subsequent date it entered a like order in the Thomas case. In the opinion in the Thomas case the questions of practice, and the authorities bearing thereon, are fully discussed. We do not care to go over this discussion.

In the brief of counsel for Green County, in support of the petition for *certiorari*, in the third section, attention is called to a certain statute of Indiana, and a similar statute of Kentucky, abolishing survivorship in joint tenancy. It is sufficient to say that this statute has been construed both in Kentucky and Indiana, and generally,

as giving to the personal representative of the deceased owner a right to an accounting, and a right to receive an appropriate share of the proceeds of a chose in action held in joint tenancy; but at the same time these authorities show that these statutes have no effect upon the common-law rule that the right of action, as contradistinguished from the right of property, survives. We have only to refer to the cases cited in the opinion of the Circuit Court of Appeals; especially Morrison v. Winn, — Hardin (Ky.), 480; Brown v. King, 1 Bibb (Ky.), 462; McIntosh v. Zaring, 150 Ind. 309, and to the full statement on this subject in Pomeroy, Code Remedies, Section 143 (4th Edition).

In reference to the decision of the Circuit Court of Appeals on the merits of the case, we are content to rest upon the opinion of that court.

We respectfully submit that the motion for a *certiorari* should be denied.

ALEXANDER POPE HUMPHREY,
For Respondents.

Office Supreme Court, U. S.
FILED.
DEC 7 1908
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1908.

NO. 352

GREEN COUNTY, KENTUCKY, - - Petitioner,

vs.

JOHN THOMAS' EXECUTOR et al. - Respondents.

Brief of Argument for Petitioner.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel.

GEO. G. FETTER COMPANY, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1908.

NO. 352.

GREEN COUNTY, KENTUCKY, - - Petitioner,

vs.

JOHN THOMAS' EXECUTOR,
HENRY KNIPPENBERG, et al, - Respondents,

BRIEF OF ARGUMENT FOR GREEN COUNTY.

This case is before the court on writ of certiorari to the United States Circuit Court of Appeals for the sixth circuit to review a decision reversing a judgment of the United States Circuit Court for the Western District of Kentucky in favor of Green county, Kentucky, in a suit by John Thomas and others upon certain bonds and coupons purporting to have been issued by that county for the old Cumberland & Ohio Railroad Company.

The case is like that of Quinlan just briefed and argued in respect of the validity of the bonds, and in some measure as to the findings of fact, but presents so many other and different questions of law and fact as to necessitate a separate statement and particularly of the points of divergence.

On August 29, 1894, many persons as plaintiffs, claiming to be joint owners and holders, brought suit in the Circuit Court for the Kentucky District against Green county, Kentucky, upon the bonds and coupons set forth in the petition. They were (Record, 2) John Thomas, Maria D. Leech, Sherley D. Murphy, Jessie D. Wood, Helen R. Edson, W. E. Rockwood, Chas. B. Rockwood, Eliza C.

Hendricks, Harriet Jones, Mrs. R. K. Lord, Hannah A. Mansur, and Chas. W. Mansur (the latter two as administrators of Wm. Mansur, deceased), Wm. S. Hubbard, Geo. B. Yandes, E. R. Forsyth, J. N. Kinney, R. J. Bright, J. C. Thomas, and H. L. Brenneman (the last two as executors of Briggs Swift, deceased), L. W. Hasselman, J. H. Kurtz and three corporations, the Wabash College, the Meridian National Bank and the Indianapolis Rolling Mills Company, all citizens of Indiana. Green county demurred specially (Record, p. 8) to the petition because the foreign personal representatives had not qualified themselves to sue in Kentucky. The court instead of sustaining the special demurrer (Record, 8) granted the plaintiffs time to file letters of administration and to execute the bonds required by law.

The executors of Briggs Swift alone executed a bond. The plaintiffs thereafter waited for four years, or until February 21, 1898, when, in obedience to an order of court, they filed an amended and paragraphed petition (Record, 12). The defendant answered (Record, p. 17), pleading the contract of subscription, denying joint ownership of plaintiffs, and also denying that there had been an exoneration from the Elizabethtown & Tennessee subscription; and this answer was verified by D. T. Towles, who was then the county judge (Record, 21) and who, years before, at the time of the subscription to the Elizabethtown & Tennessee Railroad was the county clerk.

The reply of plaintiffs (Record, 22) alleged that "all of the bonds and coupons sued on were issued according to law all of which will appear by various orders of said Green County Court, duly certified copies of which are filed herewith as part hereof," etc. These orders were filed (Record, 26 to 29). The reply further alleged (Record, 23) in paragraph 3 that Green county "executed and issued said bonds and coupons in payment for shares thereof (Cumberland &

Ohio R. R. Co.), and pursuant to and in accordance with the act of the Legislature of Kentucky and in accordance with the order of the said Green County Court, approved by a vote of the people and voters of said county." They based their claim to recover on the compliance, which they alleged, with the terms of the orders of the county court.

Appended to the first answer of the county were certain interrogatories (Record, 21) addressed to the plaintiffs and calling upon them to state how they obtained the papers sued upon, and in what way they owned jointly. Not all, but the majority of the plaintiffs answered the interrogatories (Record, 46 to 66). The answer of the Indianapolis Rolling Mill Company (Record 60) read:

> "2. That said bonds were taken by this plaintiff for iron furnished by it to be used in building the Cumberland & Ohio railroad through Green county, Kentucky, and said bonds were turned over to said stockholders as dividends on their stock and by agreement among the said stockholders, to which this plaintiff was a party more than fifteen years ago, the plaintiffs became the joint owners and holders of all the bonds sued on herein. Upon the distribution of said bonds as aforesaid twelve hundred dollars thereof still remain as an asset of the company, being the interest still owned by it and mentioned in said agreement with the stockholders."

The other plaintiffs who answered stated their ownership in almost the same language, each giving the amount of the dividend to him, her or it distributed.

The plaintiffs some time in 1898 filed another amended petition setting forth the deaths of John Thomas, L. W. Hasselman and Harriet Jones (Record, 40), and sought a revivor in the names of their executors or heirs and alleged that the deaths occurred "within twelve months last past,"

namely, within that time of the verification or filing of the amended pleading the third day of October, 1898. Thereafter, on October 20, 1899, the county amended its answer and denied that the deaths had occurred within twelve months of October 3, 1898. The county had already suggested (Record, 67) the death of Harriet Jones and stated that it occurred prior to February 21, 1895, and filed an attested copy of the record of the Marion Circuit Court of Indiana, showing that her will was probated on that day.

The county in its answer (Record, pp. 70 & 71) also in substance stated that the Indianapolis Rolling Mill Co. upon obtaining possession had declared a dividend of the bonds and coupons among its stockholders; that thereby the ownership of each became separate and distinct; the amount of dividend going to each was stated showing amounts from $100.00 up to less than $2,000.00 as to the following named stockholders: Hasselman, Hendricks, the Jones' heirs, Hubbard, the Mansur heirs, Yandes, Forsyth, Bright, Briggs Swift's heirs, Kurtz, the bank, the rolling mill and the college; that they could not be joint owners; and that all the plaintiffs joined or aggregated their bonds for the purpose of bringing a suit in a Federal court; that they could not be partners and that by reason of these facts the circuit court had no jurisdiction of the case or the claims of any of the plaintiffs. The reply to this pleading (Record, 71) denied that by the dividend the interests of the stockholders were separate and the obligation of the county if any, separate as to each; denied that they had joined for convenience of suit; denied that the circuit court had no jurisdiction; all which denials were mere conclusions of law. The reply stated that "they say they are not partners but joint owners of said bonds and coupons and every part of them." The contract of joint ownership was never furnish-

ed, and no evidence whatever was ever offered in the circuit court to prove a joint ownership.

The pleadings went on in respect of other matters up to and until the plaintiffs filed a surrejoinder on October 23, 1899, when the case took a rest for several years.

On October 12, 1903, the defendant filed an amended answer (Record, p. 80) and there were from time to time other pleadings down to a final rejoinder.

On March 14, 1904, the county moved for a rule on the surviving plaintiffs (Record, 91) to furnish the dates of the deaths of the parties plaintiff named in the petition who had died since the institution of the action ten years before and to show cause why the action should not be dismissed for failure to revive within the time prescribed by law. A response was filed by their attorney (Record, 92) and verified by him to the effect that the plaintiffs had "no knowledge of the death of any of the plaintiffs except such as the record showed and that the action had been revived in the names of their proper representatives." The response further stated that the plaintiffs were joint owners of *and partners in the bonds sued on* and that no revivor was necessary, and alleged that defendant had waived the right to require a revivor. The record does not show that there was any argument on this response, and as a matter of fact there was none. The circuit court denied the motion for the rule.

The record (p. 93) shows that on March 22, 1905, when the plaintiffs filed a demurrer to each paragraph of defendant's amended answer filed on October 12, 1903, a year and a half previously, and also filed a reply to that answer, defendant demurred "and thereupon the defendant moved the court to dismiss the action on the ground of misjoinder of plaintiffs, and for want of jurisdiction of such of the plaintiffs whose claims are separately less than $2,000.00, and a stipulation was filed waiving a jury and as to evidence, and

the motions and actions were submitted to the court for judgment.

The stipulation (Record, 98) also contained these words:

> "The pleadings, exhibits, answers to interrogatories and depositions herein, and the testimony and evidence by deposition and orally taken, read or heard upon the hearing of the case of L. G. Quinlan v. Green County at the October 26, 1904, term of this court are subject to all legal exceptions to be treated and read so far as applicable as testimony and evidence in this action on the hearing of the motions of defendant to dismiss and on the merits of the case this day submitted."

This stipulation is stated in full as the majority opinion of the Circuit Court of Appeals (Record, 127) seems to proceed upon the idea that this Thomas case was decided only on the record of the Quinlan case. That record could have nothing to do with any of the questions as to joint ownership, or collusive character of parties in this case, or failure to revive. Those matters were all in the "pleadings and interrogatories" in the case now at this bar. There was no deposition in the Thomas case in the circuit court which touched upon these questions.

The circuit court made in this case the same findings of fact as in the Quinlan case with some exceptions. As the so-called plaintiffs claimed in their pleadings that the Indianapolis Rolling Mill Company had taken the bonds for railroad iron, the circuit court in finding 12 (Record, 101) that "afterwards the rails and ties and superstructure generally were put upon the track theretofore graded . . . by the Louisville & Nashville Railroad Company, at its own expense and and not with any of the bonds issued as aforesaid by the defendant," necessarily determined that none of

the proceeds even of the bonds or coupons in this case were ever expended in Green county.

The first finding (Record, 98) was in these words:

> "The court finds that all the plaintiffs are citizens of other States than Kentucky, and were so when this action was instituted on the 29th day of August, 1894, and that the plaintiffs were then the *bona fide* holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

This first finding was in response to the issue raised in the denial by the defendant (Record, p. 18) that "any of the plaintiffs ever purchased the said bonds or coupons, or any of them, for a valuable consideration, after it or they had been executed or delivered by the county of Green," etc.

The circuit court did not find that the plaintiffs were joint owners or holders, but the court dismissed the petition and gave judgment for the county.

A writ of error was then sued out from the Circuit Court of Appeals for the sixth circuit. Over eight months thereafter when the case was called Green county (Record 114) moved the Circuit Court of Appeals to dismiss the writ of error for the reasons that the judgment of the circuit court was against the plaintiffs jointly and without a summons and severance only a part of the plaintiffs prosecuted the writ of error and some did not join in the petition for the writ nor were they named therein, viz.: Hannah and Charles Mansur, Henry Knippenberg, executor of John Thomas, deceased, Elizabeth Hasselman, executrix, Elisha F., John, Benjamin, Cora, Aquilla Q., Edwin S., William M. and Frederick Jones, Emma J. Holloway and David A. Meyer's administrator, and (2) because these persons who are mentioned in the petition for the writ and in the writ

were never parties to the action, viz.: John Thomas as executor of Thomas P. Hendricks, Thomas A. Hendricks, C. B. Parkman, William Mansur and Briggs Swift, and (3) because Eliza C. Hendricks, once a party to the action, or named in the petition as such, had died more than a year before the judgment in the circuit court; and because (4) there had been when the case was called no brief filed for the plaintiffs in error.

The county also moved the Circuit Court of Appeals to affirm the judgment because the plaintiffs in the circuit court, if not joint owners of the bonds and coupons sued upon, had no right to sue jointly and the circuit court was without jurisdiction of the action and its order dismissing the petition was proper.

Counsel appeared on the other side and at the same time moved the Circuit Court of Appeals to amend the writ so as to strike out certain names and to insert certain names. The motion to dismiss was overruled and the amendments were allowed. The Circuit Court of Appeals did not pass upon the question whether the plaintiffs had been or were joint owners, but said in the opinion:

> "If in fact the plaintiffs were joint owners of the bonds and coupons in suit, it would seem, under section 956, Rev. Stats., that the suit might proceed in the name of the survivors upon the suggestion of the death upon the record, and that the suit would not abate. The question as to whether they were such joint owners is one of mixed fact and law and we pretermit the present determination of that question. For the purposes of the present motion we assume the fact to be as averred in the pleadings. Upon that premise it was unnecessary to revive in consequence of the death of any person named as plaintiff, and the suit did not abate for want of such revivor." Record, p. 121) S. C., 77 C. C. A.

The effect of this amendment and revivor was to resurrect in the Court of Appeals plaintiffs in the lower court who had been dead for many years and as to whom the suit had long since abated, and also to introduce into the higher court persons as plaintiffs who had never been parties at all in the case below. Not all the persons named as plaintiffs in the circuit court were revivified. The name of Mrs. Eliza C. Hendricks, who had died a year before the judgment in the circuit court, and whose death had been at the time suggested (affidavit, Record, 114) and who was nevertheless mentioned among the plaintiffs in error, was stricken from the petition and writ of error.

On final hearing the Circuit Court of Appeals rendered an opinion (Judge Lurton dissenting), reversed the circuit court, and remanded the cause (Record, 123), "with directions to the said circuit court that upon the suggestion on the record of the deaths of such of the original plaintiffs as have died pending the suit and striking out the names of their personal representatives, it enter judgment for the plaintiffs as they then appear of record for the amount of the principal of the bonds in suit with interest thereon from the date when their latest coupons severally become due and for the coupons in suit with interest on each from the time when they severally fell due."

In other words the judgment ordered is to be that if any of the original plaintiffs have died since the suit was originally brought in the circuit court their bonds and coupons are to go by succession to the survivors of the plaintiffs and they shall recover against the county for all the bonds and coupons and interest sued upon; and also necessarily adjudges that if any of the parties to the original contract of joint tenancy died before the suit was brought his right did not survive to the others under the contract, but went to his heirs or representatives; but if any party to the suit

had died his interest went to the survivors and to the representatives of those original parties who have joined in this action.

To review this judgment the Supreme Court has granted this certiorari.

ARGUMENT.

I.

The Circuit Court of Appeals erred in holding that the original plaintiffs were joint tenants or owners of the bonds with right of survivorship.

By the laws of Kentucky, the forum, and of Indiana where the alleged contract of joint ownership was made, joint tenancies have been abolished.

Kentucky Statutes, section 2348:

> "Joint tenants may be compelled to make partition; and when a joint tenant dies, his part of the joint estate, real or personal, shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution."

Indiana Rev. Stat., section 8136:

> "The survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common, unless otherwise expressed in the instrument."

Who are joint tenants?

Cyc., vol. 23, p. 484, says:

> "The essential difference between joint tenants and tenants in common is that joint tenants hold the

> property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights. They also differ in that the right of survivorship exists in case of joint tenancy, but not in tenancy in common."

Cyc., at same page says:

> "As a general rule, all natural persons are capable of becoming joint tenants but bodies politic or corporations can not be joint tenants either between themselves or with natural persons."

Thompson on Corporations, vol. 5, sec. 5793, says:

> "A corporation can not take an estate in joint tenancy either jointly with another corporation or with a natural person."

Cook on Corporations, 4th ed., does not seem to mention the matter of joint tenancies. It has no connection with the subject of corporations.

In Telfair v. Howe, 3 Rich. Eq. (S. C.) 55 Am. Dec., 637, the chancellor, after quoting Coke and other authorities, said:

> "I doubt very much if a single case, either English or American, can be adduced where a corporation or body politic has been held to be seised or possessed of an estate in joint tenancy."

Judge Lurton in his dissenting opinion (Record, 129), speaking of the Indiana statute said:

> "The effect of this Indiana Statute is to abolish survivorship unless otherwise provided for. This is the practical concession of the majority for, upon

> that ground, they say, that a corporation may be a joint tenant with natural persons, a thing unknown to the common law. There was no agreement in respect of survivorship."

There are several corporations in this particular alleged joint tenancy, viz.: Wabash College, Indianapolis Rolling Mill Company, Meridian National Bank, The alleged plaintiffs could not for other reasons be joint tenants.

Cyc., vol. 23, p. 484, states:

> "To create a joint tenancy, there must co-exist four unities: (1) Unity of interest; (2) unity of title; (3) unity of time; (4) unity of possession; that is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time, except in cases of uses and executory devises, and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole."

These rules can not possibly be made to fit the interests of the original plaintiffs at the time the suit was brought or since. The amended answer of the county (Record, 70) shows and it was never denied, that the rolling mill got the papers originally and retained $1,200.00 of bonds as an asset, and received the bonds from the railroad company; others got the bonds as dividends; others as legatees of the original stockholders; Kurtz got a five hundred dollar bond from the Second Presbyterian Church Mission, of Indianapolis, which got its title through the will of one Peck.

Shirley D. Murphy and Jesse D. Wood (Record, p. 58) got one-half of sixty-six hundred dollars with interest thereon, through Dillard Ricketts, a stockholder, who died, leaving his interest to his widow, Indiana C. Ricketts, who died,

leaving her interest to Shirley D. Murphy and Jesse D. Woods. How these bonds or the interest in them of the joint tenant Ricketts could be bequeathed when they had gone by his death to the surviving joint tenants is not explained.

Helen R. Edson (Record, p. 56) got her interest through W. O. Rockwood, who died intestate, leaving his interest in the bonds to his widow and children, and then the mother died and the children inherited her interest. So with Wm. E. and Charles B. Rockwood.

The Jones (Record, page 53) are legatees and heirs of Aquilla Jones, deceased. Mrs. Hendricks was legatee of her husband. (Record, p. 65.)

It is unnecessary to detail specially the derivation of all the titles. The original titles were separate and distinct through the dividend. "The term 'dividend' in its technical, as well as its ordinary acceptation, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its stockholders." Mobile, etc., R. R. v. Tennessee, 153 U. S., 486. It is claimed that after this the holders by agreement of 20th December, 1879, became joint owners. Had this agreement been legally made it was abrogated by common consent or by the subsequent conduct of the parties and the joint ownership or tenancy was severed. Cyc., Vol. 23, page 487, states:

> "A joint tenancy may be terminated or severed, as it is frequently called, by any act that destroys one or more of its unities." . . . "Thus a joint tenancy may be severed by one or a part of the co-tenants conveying or otherwise disposing of their shares, as this destroys the unity of title and creates a severance as to such shares; as where one joint tenant assigns, mortgages or pledges, or loses his interest." . . . "It may also be terminated alto-

> gether by mutual agreement, or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common."

These parties treated their interests as separate and distinct entities, transferable by will or otherwise. Nowhere in any pleading and nowhere in any of the answers to the interrogatories was there ever a hint that the interest of one dying would be lost or in any way be lessened.

Applying these principles to the facts in this record, it seems to counsel for Green county that it is impossible to hold the original plaintiffs to be or to have been, when this suit was brought, or later, joint tenants or owners of the bonds, or that the rights or interests of any of those who died, survived to the remaining owners. They never produced the contract creating the alleged joint ownership so that the court could judge of its effect.

The plaintiffs were not partners. The county in a pleading (Record, p. 70) alleged that they were not partners and this was admitted in a verified reply by the attorney of the plaintiffs (Record, p. 72), wherein "they say *they are not partners* but joint owners of said bonds and coupons, and every part of them." They never sued as partners, and are not mentioned as such in any pleading. It is true in the response (Record, p. 92) it is said the plaintiffs are joint owners and partners;" and the opinion of the Court of Appeals states (Record, p. 127): This response was sworn to by the plaintiffs' attorney." But so was the pleading stating they were not partners. What sort of partnership could exist among a college, a rolling mill, a national bank and the other men and women of the firm? They may have formed a copartnership for the business of bringing a suit in a Federal court.

II.

The Court of Appeals erred in not affirming the case, because the parties plaintiff in the circuit court had all joined together merely that all might sue in one action. If there was a joinder for this purpose the suit should have been dismissed as to all. It is certain that they were not joint owners in law, nor were they joint owners in fact. The interrogatories which were brought into the appellate record by the other side are part pleading and part affidavits. It was unnecessary for the county to plead collusion, although it did so. All that was necessary under the decisions of this court was for the record to show that before the judgment the matter was brought to the attention of the trial judge. The pleadings and the interrogatories show this and the circuit court did dismiss the petition. What earthly motive for this alleged joint ownership could there have been except to sue together in the Federal Circuit Court in Kentucky? It was incumbent upon the plaintiffs there to show the contract, and, of course, the purpose of it would then have been disclosed.

Mr. Chief Justice Waite, in Williams v. Nottawa, 14 Otto, 209-213, said:

> "Inasmuch, therefore, as it was the duty of the circuit court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to have stopped all further proceedings and dismissed the suit, the judgment is reversed, and the cause remanded, with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that court, leaving the parties in interest to such remedies as they may each be entitled to for recovery of any

amount that may be due them respectively on the bonds they severally own. In this connection, we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases. If they improperly dismiss a cause, their action in that behalf is expressly made reviewable here. Whether if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide. That would be a different case from this. Here the party, guilty of the collusion asks relief from a judgment against himself. In such case we deem it our duty to stop the case just where it should have been stopped in the court below, and remit the parties to their original rights."

III.

If the parties plaintiff in the circuit court were joint owners with right of survivorship, or were joint owners without such right, the Circuit Court of Appeals erred in not sustaining the motion of the county to dismiss the writ of error. The judgment of the circuit court was joint against all the plaintiffs, and it is conceded that Emma J. Holloway and David A. Meyers as administrator did not join in the writ. If the Jones' heirs had ever been parties they did not join; and if Knippenberg as Thomas' executor had ever been a party he was not joined in the writ, and the same is true as to Hasselman and Mrs. Hendricks. The Circuit Court of Appeals had decided in Ayres v. Polsdorfer, 105 Fed., 737, that:

"The rule is firmly established at least in the appellate courts of the United States, that where a judgment or decree is rendered against two or more

> jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record of the circuit court before a writ of error or any appeal by less than the whole can be allowed;" and, further, that this matter is *"treated as one of jurisdiction."*

In the Ayres case the authorities were fully collected.

IV.

The Circuit Court of Appeals erred in allowing the writ to be amended. It will presently be shown in detail that as to over a third of the bonds and coupons the suit in the circuit court had abated. The allowance of the amendment had the effect of restoring these claims as though there had never been any fault upon the part of the plaintiffs in the circuit court. In Walton v. Marietta Chair Company, 157 U. S., 348, this court said:

> "But the amendment rests in the discretion of the court, and will not be allowed if there is danger of prejudice to the adverse party, or if there is any other good reason against it," etc.

The statute says:

> "Provided the defect has not prejudiced, and the amendment will not prejudice the defendant in error."

None of the cases in this court allowing amendments of writs of error go so far as to permit the making of an entirely new case in the appellate court, and in none are the facts like those in the case at bar.

There never was any revivor as to any of the plaintiffs who died pending the action.

Take the cases of John Thomas, L. W. Hasselman and Harriet Jones, three of the plaintiffs named in the petition (Record, p. 2). Plaintiffs, four years after the suit was brought, filed an amended petition (Record, p. 40) and prayed a revivor as to Thomas, Hasselman, and Harriet Jones, and in the same petition stated that they had died within twelve months last past, meaning, of course, twelve months before the 3d of October, 1898, the date of the amended petition. The county answered (Record, p. 69), denying that John Thomas, L. W. Hasselman, and Harriet Jones died within the time stated. This was all the county could be required to do. There was no order on this petition for revivor on the defendant. Plaintiffs never attempted to show that Thomas or Hasselman or Mrs. Jones had died within the twelve months, and it was not a fact, and there could have been no revivor unless that had been proved. The record shows that Mrs. Jones died, or at least that her will was probated, on the 21st day of February, 1895. (Record, pages 67 and 68.) It is significant that the other orders in the record showing the qualification of representatives in Indiana do not contain any statement as to the time of the deaths of the original parties.

Civil Code (Ky.), section 509:

> "An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made," etc.

Civil Code, section 500, provides among other things:

> "If the right of action survive to or against the re-

maining parties, the action may proceed, without revivor, after statement on the record of such death or cessation of power."

This is the same as section 956, Rev. Stat., U. S.

In our case the right of the plaintiffs dying did not survive to the others and there was, therefore, no right to proceed without revivor. Revivor of actions being purely statutory, the methods provided by the codes and statutes are exclusive. Lyon v. Park, 55 N. Y. Supreme Court, 539.

The county never waived any of its rights to require a revivor as one consideration will show. The defendant in its first answer filed in the case (Record, p. 18) denied that the plaintiffs were joint owners or holders of the bonds. That issue could not be decided until the final submission of the case, and until it was decided the defendant could not require a revivor as to any plaintiff who died pending the action, for if the plaintiffs were joint tenants and the right of one dying passed to the others no revivor was necessary. Assuredly the defendant could not be required to know when any particular plaintiff died; for instance, the death of Mrs. Eliza Hendricks, who died before the filing of the response (Record, p. 92), which stated that the plaintiffs had "no knowledge of the death of any of the plaintiffs, except such as shown in the record herein."

From time to time, during the ten years and more, the case was on the docket, the death of different plaintiffs was suggested, or in some way crept into the record, but the defendant could not compel a revivor if they had been joint tenants, and was compelled to go on with the case, and by so doing could not have waived any of its rights. The denial of the deaths of Thomas, Hasselman and Mrs. Jones within the time fixed by law permitting a revivor was not a waiver of revivor, but distinctly put in issue the facts es-

sential to authorize such a proceeding. The court never decided that these deaths occurred within the year. The record showed the allegation was not true and the court probably thought that was finding enough. The court dismissed the petition and besides the finding was in effect against the plaintiffs, as "the silence of a special finding as to a fact is equivalent to a finding against the party having the burden of proof." U. S. v. Harris, 77 Fed., 821; Sneed v. Sabinal Mining Co., 20 C. C. A., 231; 73 Fed., 925.

The motion to amend the writ should have been overruled because of the delay in making it. The record was prepared for the Circuit Court of Appeals under the supervision of the present counsel for respondents and was filed by them on September 1, 1905 (Record, p. 1). The motion to amend was not made until May 1, 1906, when the case was on the calendar for hearing (Record, p. 112). The present counsel had eight months' time to familiarize themselves with their own record.

The cases cited in the last opinion of the majority of the Circuit Court of Appeals to show that the county had waived its right to require revivor do not sustain the position, and differ in their facts from those in this case. Wetzel v. Travis, 75 C. C. A., 266; Wilhite v. Skelton, 78 C. C. A., 635.

V.

The ownership, joint or otherwise, of $10,500.00 of bonds, face value, has never been accounted for at all. The coupons thereto attached are not included in the calculation. They also are not accounted for.

The interrogatories with defendant's answer (Record, pp. 46 to 66), were addressed to each and all the plaintiffs. The following (Record, 46 to 66), answered to their ownership and amount of bonds:

Geo. B. Yandes	$1,500 00
Harriet Jones' estate	1,400 00
Briggs Swift's estate	1,000 00
W. S. Hubbard	1,000 00
Wm. O. Rockwood's estate, three heirs each one-third of	5,300 00
Dillard Ricketts' estate	6,600 00
Kurtz	500 00
Wm. Manson's estate	1,000 00
Indianapolis Rolling Mills	1,200 00
A. R. Forsythe's estate	100 00
Meridian National Bank	1,800 00
Wabash College	2,000 00
L. W. Hasselman's estate	500 00
Maria D. Leach (through Charles B. Parkman)	3,500 00
Eliza C. Hendricks (dec'd, no revivor ever attempted)	1,800 00
R. J. Bright	1,000 00
Total	$30,200 00
The amount of bonds sued on (Record, 17)	40,700 00
	30,200 00
Bonds, ownership or title unaccounted for	$10,500 00

Did these belong to John Thomas? He never answered the interrogatories and is now dead; and there was never any revivor as to him. None of the other plaintiffs claimed any interest in these bonds of.....$10,500 00

There was no revivor as to Mrs. Hendricks, who claimed bonds	1,800 00
Hasselman's estate, no revivor	500 00
Harriet Jones' estate, no revivor	1,400 00
Bonds necessarily out of the case	$14,200 00

And of course all the coupons on these bonds. The total of unaccounted for bonds and coupons with interest now amounts to something like $35,000.00.

VI.

The Circuit Court of Appeals erred in not affirming the judgment of the circuit court for the reason that the personal representatives who appeared as plaintiffs in the lower court never gave the bonds required by the Kentucky laws. Said Mr. Justice Gray in Johnston v. Powers, 113 U. S., 156:

> "The plaintiff certainly can not maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect, because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State and can not authorize him to maintain any suits in the courts, either State or national, held in any other State."

The Kentucky Court of Appeals, 91 Ky., 93, in Marrett v. Babb's Executor, said:

> "There is, however, nothing in this record showing that he has ever qualified as executor in this State or taken the steps required by our statute to enable him even to sue for debt. The petition does not so aver, nor is it shown in any way. He appears only as a foreign executor. As such he has no power to sue here. His existence is not recognized. Section 43, article 2, chapter 29, of our General Statutes, provides: 'By giving bond, with surety, resident of the county in which the action is brought, non-resident executors or administrators of persons

> who at the time of their death were non-residents of the Commonwealth, may prosecute actions for the recovery of debts due such decedents.' "

In the case of Swift v. Donohue, 104 Ky., 137, it was decided that the prosecution bonds might be waived by failing to demur specially or to demand them. The county demurred specially on this ground as the first step in the case (Record, p. 8). As to Knippenberg, John Thomas' alleged executor, and the Hasselman executor, and the estate of Miss Harriet Jones, they were, as has been shown, never parties in the circuit court. Their right to be parties was put in issue and unless this were decided in their favor, and it was not, there was no right upon the part of the court to require a bond of them. As shown in the case of Swift v. Donohue, two bonds are required of non-resident representatives—one for costs and one before a judgment can be rendered for such a plaintiff. The judgment of the Circuit Court of Appeals made no provision for the latter.

VII.

It might have been stated more appropriately perhaps under another head of this brief that under the former and long continued practice in the Kentucky Federal courts objections to the plaintiff on the score of collusive or fraudulent suit were always made by a preliminary plea in abatement, but the Circuit Court of Appeals, sixth circuit, in Roberts v. Langenbach, 56 C. C. A., 253, has held that in code states the proper practice is to plead such defense in the answer along with other defenses.

VIII.

It was error in the Circuit Court of Appeals to hold that the plaintiffs in the circuit court ever could have been hold-

ers without notice. The Cumberland & Ohio Railroad Company had notice of all the terms of the contract to which it was a party. Its transferee, the Rolling Mill Company, had notice, because the reply stated that the bonds were issued under the orders of the county court, and they were filed with and as part of the pleading. When the dividend was declared the officers certainly and the stockholders knew what they were taking. They say the iron was to build a road through the county. How much iron was traded and at what discount the bonds were taken neither the Rolling Mill Company nor the others disclose. There are in this record facts which seem to counsel to demonstrate that these papers were taken knowingly on a mere venture. Why did the Rolling Mill Company take the bonds in the first place? They were not in the bond business. Why not have required the railroad company to dispose of those salable bonds and pay cash for the rails?

Why, after the Rolling Mill Company got the bonds and desired to declare a dividend among the shareholders did it not dispose of these salable bonds in the open market and divide the cash among the members of the company? Was this because the contingent liability could not be sold? Why, after the dividend of these bonds did not some of the stockholders not dispose of their salable bonds or interests otherwise than by will, or by descent to some heir or representative? Why did they hold these salable bonds for years even after their maturity before bringing suit to enforce them? Why did they enter into the alleged contract of "joint ownership" in 1879, unless it was because they knew that the Cumberland & Ohio Railroad Company had ceased to exist, and that there had been a total collapse of the venture of the road, and of any possible salable value of the contingent bonds, and by hanging together they could claim to be common owners and by joint suit get into the

Federal Court, and by sharing jointly lessen the expense to the respective owners?

If this suit can be sustained, then in any case where persons separately owning bonds less than the amount necessary to give jurisdiction to a Federal Court call themselves joint owners, the statute, intended by Congress to prevent such "joining," and which this court has repeatedly said is a "wholesome," a "salutary" statute, may be repealed or nullified at the pleasure or convenience of the parties. If some own amounts sufficient to confer jurisdiction they are in the same boat with the others, and if they propose to share the profits they must expect also to share the dangers of the voyage.

IX.

It was error in the Circuit Court of Appeals even if the case should have been reversed to order judgment against the county on the bonds and coupons that had been owned by the persons who, if parties plaintiff, had died during the pendency of the suit, and for whose estates the case had not been revived. It is stated in 18 Enc. Plead. & Practice, 1124:

> "As a general rule, in all cases where the representatives of a deceased complainant are not made parties, according to the statutory provision, within the prescribed time after the suggestion of the death, the suit will abate as to the deceased party and the interest of his representatives therein, and the cause will proceed in favor of and against the survivors."

Therefore, if the judgment of the circuit court should have been reversed, the Circuit Court of Appeals should have directed, if at all, a judgment only for the surviving plaintiffs. This would have saved the county bonds, face

value, belonging to the Thomas' estate, $10,200.00; the Hendricks' estate, $1,800.00; the Hasselman estate, $500.00; Harriet Jones' estate, $1,400.00; the Forsyth estate, $100.00, and the Mansur estate, $1,000.00, and the coupons and interest on bonds and coupons.

And also in any event the suit upon bonds of owners of less than the jurisdictional amount should have been ordered dismissed.

The law in regard to joint obligees has absolutely no relevance in the consideration of this case. The bonds were never made payable to two or more persons. Each was a separate obligation, and the bonds were owned by distinct persons and in distinct sums. Counsel would not be understood as claiming for a moment that two persons, natural or artificial, could not own in common a bond payable to bearer. That is not the case here.

X.

The Circuit Court of Appeals erred in not affirming the judgment of the circuit court on the ground that the county was not liable on the bonds and coupons at all.

This brief has been confined almost wholly to the peculiar facts in this record and apart from the general questions as to the validity or enforceability of the bonds which have been fully gone over in the Quinlan case.

We ask that the judgment of the Circuit Court of Appeals be reversed, and that the judgment of the circuit court be affirmed.

Respectfully submitted,

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel for Green County.

Office Supreme Court, U. S.
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DEC 15 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM.

No. 352.

GREEN COUNTY, KENTUCKY, ... *Petitioner*,

VERSUS

JOHN THOMAS, Executor, *et al.*, . . . *Respondents*.

BRIEF FOR RESPONDENTS.

ALEXANDER P. HUMPHREY,
Of Counsel for Thomas and Others.

ALEXANDER C. AYERS,
ALEXANDER P. HUMPHREY,
Counsel.

JOHN P. MORTON & COMPANY, INCORPORATED, LOUISVILLE

Supreme Court of the United States.

OCTOBER TERM.

No. 352.

GREEN COUNTY, KENTUCKY, - - - - - *Petitioner,*

vs.

JOHN THOMAS, EXECUTOR, ET AL., - - *Respondents.*

BRIEF FOR RESPONDENTS.

As this record is in some confusion it may be well to make a somewhat extended statement, although we shall be as concise as possible.

In the Circuit Court judgment went in favor of the defendant, Green County. On writ of error to the Circuit Court of Appeals for the Sixth Circuit this judgment was reversed with directions to enter judgment for the plaintiffs. Green County, the original defendant, has brought the case here by writ of certiorari. We will use the names "plaintiffs" and "defendants" throughout the brief as indicating the parties as they stood in the court of first instance.

On August 29, 1904, a number of plaintiffs filed suit in the Circuit Court of the United States for the District of Kentucky against Green County. The petition, after describing the plaintiffs, alleges as follows:

"Plaintiffs state that they are jointly the owners and holders of all the bonds and coupons hereinafter specifically set forth."

The petition then states that Green County, on April, 1871, pursuant to authority and powers vested in it by law, for a valuable consideration, to wit, the payment by it of its subscription to the capital stock of the Cumberland & Ohio Railway Company, made, executed, and issued its several bonds as thereinafter set forth; some of the denomination of $1,000, some of $500, and some of $100, attaching to each of said bonds 40 interest coupons representing the semi-annual interest for twenty years from April 1, 1871; that each of these bonds was signed by the judge and attested by the clerk, and by them the County of Green promised to pay the contents twenty years after date.

Further, the petition recites: "Plaintiffs say they are the joint holders and owners of the following 28 bonds of the County of Green, which were made, executed, and issued at the times and in the manner and upon the terms and for the consideration hereinbefore stated."

These are the $1,000 bonds, and their numbers are set out.

It further states: "Plaintiffs are also joint owners and holders of the following mentioned and numbered interest coupons." These are coupons attached to these one thousand dollar bonds.

Then, that "they are the joint owners and holders of the following 22 bonds of $500 each." Then, that "they are the joint owners and holders" of the coupons on said 22 bonds.

Then, that "they are the joint holders and owners" of 17 bonds of $100 each. Then, that "they are the joint holders and owners" of certain coupons taken from the one hundred dollar bonds.

It is alleged that all the bonds and coupons are due.

There is a further allegation in regard to the joint ownership and holding of certain other coupons, all of which are described.

The plaintiff prays judgment for the various sums due. (R. 6.)

On October 4, 1897, the defendant, Green County, entered a special demurrer and also moved the court to require the plaintiffs to paragraph their petition. (R. 8.) The demurrer was overruled. (R. 9.)

On January 18, 1898 (R. 11), the motion to require the plaintiffs to paragraph their petition was sustained.

Thereupon an amended and paragraphed petition was filed, in which the plaintiffs set up in separately numbered paragraphs each of the bonds and coupons upon which suit was brought. Only a part of this voluminous pleading has been printed—a sample of the paragraph on a bond and a sample of a paragraph on a coupon. (R. 14.)

On March 28, 1898 (R. 17), the defendant filed its answer. The first paragraph denies that the plaintiffs are jointly the owners and holders of all the bonds and coupons, or any of them, in the petition set forth, and denies that they were such at the commencement of the action; denies that the bonds or coupons were issued by the defendant pursuant to the authority or powers vested in it by law; denies knowledge or information sufficient to form a belief as to whether any of the plaintiffs ever purchased the bonds or coupons, or any of them, for valuable consideration.

In the second paragraph the defendant denies that it ever executed or delivered any bonds or coupons mentioned in the petition.

By paragraph 3 the defendant sets out the proceedings in reference to the subscription. It seems to allege that the subscription was to be made on condition that the company should locate and construct its railroad through Green County within one mile of the town of Greensburg, and should expend the amount to be subscribed within the limits of Green County; and "also upon the further condition that said bonds should not be issued or said county pay any part of either principal or interest of said amount subscribed as aforesaid until said County of Green should be completely exonerated from the payment of the capital stock subscribed by the County Court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company."

It is alleged that none of these so-called conditions were complied with.

The fourth paragraph asserts that the bonds and coupons sued on were obtained from the county by the fraud, covin, and misrepresentations of plaintiffs, or those under whom they claim, and that the plaintiffs are not the *bona fide* holders or owners of said coupons for value. Defendant prays that each of the plaintiffs be compelled to answer under oath interrogatories appended to the answer.

These interrogatories, addressed to each of the plaintiffs, are as follows (R. 25):

> "Interrogatory 1. State your interest, if any, in the bonds and coupons in the pleadings of plaintiffs mentioned.
>
> "Interrogatory 2. How you obtained said interest, and from whom, and if you paid anything for any of said bonds or coupons, state when, the amount and to whom.
>
> "Interrogatory 3. In what way do you jointly own or hold any of the bonds or coupons mentioned in the plaintiffs' pleadings with your co-plaintiffs, or any of them?"

On October 3, 1898 (R. 22), the plaintiffs filed a reply and also an amended petition; and each of the plaintiffs filed separate answers to the interrogatories annexed to the answer of the defendant. This reply denies that the bonds or coupons were obtained after they were dishonored, or in pursuance of any fraud. It also sets up a

former suit on certain of these coupons, and exhibits the record of this suit.

There is filed as an exhibit to this reply sundry proceedings in the Green County Court; also certified copies of proceedings in another suit in which judgment was obtained against the county by default on certain coupons taken from the bonds in controversy. At R. 46 are answers to the interrogatories addressed to Geo. B. Yandes. There are similar replies to the interrogatories by each of the plaintiffs. The replies to these interrogatories are as follows:

The first interrogatory was as above set forth—"State your interest, if any, in the bonds and coupons in the pleadings by plaintiffs mentioned."

> "1. That his interest is an undivided interest in all the bonds sued on herein in the proportion that fifteen hundred dollars with interest thereon bears to all the other bonds sued on herein."

> "Interrogatory 2. How you obtained said interest and from whom, and if you paid anything for any of said bonds or coupons, state when, the amount and to whom."

> "2. That the plaintiff and affiant was one of the stockholders in the Indianapolis Rolling Mill Company, and the said bonds were taken by said company in payment for iron furnished by said company to be used in building the Cumberland & Ohio Railroad through Green County, Kentucky; and said bonds were turned over to said stockholders as dividends on their stock, and by agreement among said stockholders more than fifteen years ago, the plaintiffs

became the joint owners and holders of all the bonds and coupons sued on herein."

Interrogatory 3 is said to be fully answered in the answer to the second.

By an amended answer (R. 69), filed October 20, 1899, Green County alleged that the plaintiffs had separate and distinct interests in these bonds, and simply joined them in order to give jurisdiction to the Federal Court. This is denied in the reply filed October 28, 1899.

There is an amended answer at R. 80, filed October 12, 1903, which sets out the transactions in the County Court of Green County. There are various other pleadings which need not be mentioned.

A jury was waived and the case submitted for findings of law and fact by the court.

The first finding is this (R. 98): "The court finds that all the plaintiffs are citizens of other States than Kentucky, and were so when this action was instituted, on the 29th day of August, 1894, and that the plaintiffs were then the *bona fide* holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

This finding is the response of the court to the issues tendered by the parties as to whether the plaintiffs were joint owners of the bonds or owners of separate bonds who had put them together in order to give the court jurisdiction.

The court further found that the Cumberland & Ohio Railroad Company was a corporation organized under the laws of Kentucky, with power to receive a subscription to its capital stock from the defendant, Green County, and that said county was authorized, conformably to law, to make a subscription to said capital stock; that on June 17, 1869, a request was presented to the Green County Court by the Commissioners of the Cumberland & Ohio Railroad Company, asking the County Court of Green County to submit to a vote of the qualified voters of said county the question "whether said court shall subscribe for and on behalf of said county and in pursuance of the provisions of the charter of said railroad company, to $250,000 of the capital stock of said company, payable in the bonds of said county, having twenty years to run, and bearing 6 per cent interest from date, upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said County of Green shall be fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company."

The court further found that the county judge had entered an order reciting this request and calling an election; that at the election a majority of votes were in favor of the subscription; that on June 3, 1870, the county judge entered an order which, after reciting the election and the ascertainment of its result, proceeded:

> "Now it further appearing that said election was held in conformity to law and in accordance with the provisions of the charter of said company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland & Ohio Railroad Company, for and on behalf of said County of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court, ordering said election and now of record in the office of this county."

The court further found that on the 12th of October, 1871, the county judge entered an order to the effect that Z. F. Smith, President of the Cumberland & Ohio Railroad, was authorized to have printed for the County of Green bonds to the amount of $250,000, in certain denominations.

The court further found that pursuant to all that was done as aforesaid, the defendant, Green County, issued and delivered to the Cumberland & Ohio Railroad Company $250,000 of its bonds of the description aforesaid,

except that the said conditions were not stated therein, in payment of said subscription to said capital stock, and thereupon there was delivered to said county in payment thereof, and said county received and has ever since held and owned, the certificates of the said railroad company for the 2,500 shares of $100 each of its capital stock so paid for by said bonds; that the bonds and coupons sued on in this action were part of the bonds thus issued; that while the proposed line of said railroad was located through said county from its northern line to its southern line, and within one mile of Greensburg, yet only about five miles of said railroad had ever been constructed, or attempted to be constructed, in said county, the part thus constructed extending from the northernmost line of said county to the town of Greensburg, the county seat, which town is located about fifteen miles from the southernmost line of the county, and about as distant from any other line of the county except the northern line; that only $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green County; that with said $150,000 of said bonds the grading, bridging, and tunneling on the track of said railroad was done and paid for over the five miles aforesaid; that work was then suspended for some years and afterwards the rails and ties and superstructure were put on the track and the railway completed from the northernmost line of the county to Greensburg, under the terms of its lease by the Louisville & Nashville Railroad Company, at its own

expense, but not with any of the bonds issued as aforesaid by Green County; that on the 15th day of April, 1872, an order was entered in the Green County Court, reciting that an application was made to the presiding judge and the President and Board of Directors of the Cumberland & Ohio Railroad Company, to issue the balance of the bonds of said county, to the amount of the subscription of the county to the Cumberland & Ohio Railroad Company, and the court being sufficiently advised, it was ordered that the balance of the said bonds be and they are hereby ordered to be issued.

The court finds the form of said bonds.

The court finds that the plaintiffs knew when they purchased the bonds sued on that the railroad had not been constructed in Green County otherwise than as therein found to be the fact, viz., from the northern line of said county to the town of Greensburg, but no further.

The court then sets out the facts in regard to a former proposed subscription to the Elizabethtown & Tennessee Railroad Company, which is the subscription from which Green County was to be exonerated, and that no formal or express exoneration of the county from the payment of said last-named subscription was ever made or attempted.

The court found as conclusions of law (1) that the plaintiffs were not entitled to recover because the conditions upon which the subscription to the capital stock of the Cumberland & Ohio Railroad Company was made,

and upon which the bonds sued on were issued, had not been performed or complied with; and (2), that the failure to recite in the bonds any of the facts herein found to be true, or any of the conditions upon which the bonds were issued, is immaterial as against the defense that there was a failure to perform the said conditions.

Thereupon the court entered judgment for the defendant, and error was taken by the plaintiffs to the Circuit Court of Appeals for the Sixth Circuit, where the case was reversed with instructions to enter a judgment for the plaintiffs. This court then granted a writ of certiorari.

After the judgment of the Circuit Court was entered the then counsel for the plaintiffs was taken very ill. While he was confined to a hotel in Louisville, by illness, he got a friend, Mr. Doolan, who had not been of counsel in the case, to prepare a petition for a writ of certiorari from a memorandum. Mr. Doolan did not compare the pleadings in the case with the memorandum furnished him by the then counsel for the plaintiffs (affidavit of W. L. Doolan, R. 111).

It seems that the names in the writ of error were taken by the counsel, not from the petition in this case, but from a judgment in another case which had been pleaded as an estoppel to the defendant's denying the validity of these bonds. The appeal bond ran in the same names as the application for the writ. The plaintiff in error moved to be allowed to amend the writ and

give a new bond, while the defendant moved the court to dismiss the writ (114). The plaintiffs were allowed to amend on the ground that the writ had run in the names of some of the wrong parties by accident. (For opinion see R. 119.)

There was another ground seriously urged for dismissing the writ both upon the hearing on the motion and the hearing in chief, which it might be well to take up now. It was that some of the parties to the original action had died more than a year before, and hence the action could not be reviewed. The Circuit Court of Appeals held on the motion to dismiss that as the plaintiffs had alleged they were joint owners of the bonds sued on this would be taken for granted on the motion to dismiss, and that under Section 957, R. S., the suit might proceed in the name of the survivors upon the suggestion of the deaths upon the record, and that the suit would not abate. (R. 121.)

Upon the final hearing of the case the defendant insisted that the plaintiffs were not joint holders of the bonds, for the reason that they could not be, some of them being corporations. The plaintiffs all stated, in their answers to the various interrogatories, that these bonds were taken by the Indianapolis Rolling Mill Company in payment of iron furnished by the company, to be used in building the Cumberland & Ohio Railroad through Green County, Kentucky; that they were turned over to the stockholders of the Indianapolis Rolling Mill

Company as dividends on their stock, and that by agreement among the said stockholders more than fifteen years before the 28th day of September, 1898, the plaintiffs became joint owners and holders of all the bonds sued on in this action. There is thus no doubt that the plaintiffs intended to become joint holders of the bonds.

A question arises as to whether some of the plaintiffs, being corporations, could be joint holders.

There is no doubt that a corporation could not be a joint tenant of real property with natural persons, as a corporation is presumed to survive forever; but there seems no reason why a corporation could not be a joint holder of negotiable paper with a natural person. Corporations are constantly suing and being sued jointly with natural persons on negotiable instruments.

It is true that there had been an attempt to revive the action on account of some of the parties having died from time to time. These bonds were payable to the bearer. When an action is maintained on a bond payable to the bearer, the holder of the bond becomes the obligee therein. When a number of people own a bond, all of such persons become such obligees. 15 Ency. Plead. and Prac., p. 531, reads:

> "Upon the death of a joint obligee the cause of action survives to his co-obligee, and all such survivors must join in the suit. The personal representative of the deceased obligee or obligees can not be joined with such survivors. Upon the death of the last survivor the cause of action passes to his

personal representative, who must sue alone without joining the personal representatives of the other deceased obligees."

This case has undoubtedly proceeded awkwardly. There should never have been any effort to revive upon the death of any of the parties plaintiff, but bringing in the representative would seem to be a case of misjoinder and would be waived by failure to object to such misjoinder. It can only be taken advantage of by motion to strike out the name of the party improperly joined, and is generally treated as mere surplusage. See Newman's Plead. and Prac., section 137, citing Caldwell v. Caldwell, 2 Bush, 446; Dean v. English, 18 B. M. 136.

It is true that both in Kentucky and Indiana statutes have abolished the right of survivorship in joint tenancy, but in both States these statutes have been construed to abolish merely the right of survivorship in the property, and not in the cause of action. The cause of action survives, and the surviving plaintiff or plaintiffs hold a proportionate part of what they recover, in trust for the representatives of the deceased. Morrison v. Winn, Hardin (Ky.), 488; Brown v. King, 1 Bibb (Ky.), 462; McIntosh v. Zaring, 150 Ind. 309; Pomeroy's Code Remedies (4th Ed.), section 143.

ARGUMENT.

The language to be construed is as follows:

> "Submit to the qualified voters of said county the question whether said County Court shall subscribe for and issue on behalf of said county $250,000 of the capital stock of the Cumberland & Ohio Railroad Company, payable in the bonds of said county, having twenty years to run, and bearing 6 per cent interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to the said Cumberland & Ohio Railroad Company until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County to the Elizabethtown & Tennessee Railroad, or any part of the interest thereon."

Taking this language in its inverse order, we consider:

1. In the last clause the language is important: "And also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to the said Cumberland & Ohio Railroad Company until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and au-

thorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon."

This court held, in Quinlan v. Green County, 205 U. S. 410, that as the county judge was the person to determine whether or not the condition precedent to the issuance of these bonds had been complied with, *i. e.*, whether the county had been exonerated from its subscription to the Elizabethtown & Tennessee Railroad, the issuance of the bonds by the county judge raised a prima facie presumption that the county had been in fact exonerated. Mr. Justice Moody remarked that it would be impossible for a purchaser of the bonds to ascertain whether this condition had been complied with, except by inquiry, which would naturally be made of the county judge himself. The county judge determined it had been complied with, and the fact that for thirty-eight years no claim has been made on account of this supposed liability shows conclusively that the judge was right.

We may, therefore, lay out of view entirely this condition as a defense.

But what of the other so-called conditions?

2. The county claims that these bonds were issued on the condition that the Cumberland & Ohio Railroad should be built through the county, and should be built within one mile of the town of Greensburg, and that the railroad should expend the amount so subscribed within

the limits of Green County. The county contends that whereas the railroad was not built through Green County but only a part of the way, and as only $150,000 of the proceeds of the bonds and not $250,000 were expended in Green County, the bonds are void.

The plaintiffs insist that these are not conditions at all, but a mere recital of the contract of the railroad company collateral to the issuance of the bonds.

It is true that these are called conditions; but whether they are conditions is not to be determined merely by the names by which they are called, but is to be gathered from the whole context of the instrument.

In Episcopal City Mission v. Appleton, 117 Mass. 326, Gray, C. J., said:

> "Although the words 'upon condition,' in a conveyance of real estate, are apt words to create a condition, any breach of which will forfeit the estate, yet they are not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, is otherwise."

In Scovill v. McMahon (62 Conn. 378), 21 L. R. A. 58, it is said:

> "The law is well established that such conditions are not favored, and are created only by express terms or by clear implication; that courts will always construe clauses in deeds as covenants, rather than conditions, if they can reasonably do so; that, if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and that, though apt words for the crea-

tion of a condition are employed, yet, in the absence of an express provision for re-entry or forfeiture, the court, from the nature of the acts to be performed or prohibited by the language of the deed, from the relation and situation of the parties, and from the entire instrument, will determine the real intention of the parties."

In Hartung v. Witte, 59 Wis. 285, 18 N. W. 175, it is said:

> "A condition or a covenant may be created by the same words; and conditions subsequent are not favored in the law (1 Inst. 203b; Willard, Real Est. 102-107); and technical words do not make a condition if they are controlled and may be otherwise interpreted by the context or matter of the instrument, and they may serve to work a covenant only according to the intention of the parties. Paschall v. Passmore, 15 Pa. St. 295; Cromwell's case, 2 Coke, 71a; Chapin v. School Dist., 35 N. H. 445; Hoyt v. Kimball, 49 N. H. 326; Wheeler v. Dascomb, 2 Cush. 285; Krantz v. McKnight, 51 Pa. St. 232."

In Stanley v. Colt, 5 Wallace, 119, Nelson, Justice, said on page 166:

> "It is true that the word 'proviso' is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust. Several cases were referred to, on the argument, to this effect, and many more might have been added."

Hence, whether these are conditions or not depends entirely upon the construction of the whole instrument.

We contend that this is not a condition subsequent because there is no clause of forfeiture, and it is quite certain that if the bonds were issued with the intention that they should become void unless the road was built in a certain manner, an express provision for voiding the bonds would have been inserted. In other words, if it had been the intention of the county officials that they should not pay the bonds unless the road was built, they would have said so.

Another reason for not believing that this is a condition can be gathered from the circumstances under which the bonds were issued. They were to pay for the subscription of the county to a road which was being constructed. It was necessary for the road to have money in order to be built. These bonds were issued to furnish this money. It was thus necessary that they should be immediately salable. If this clause is a condition, they would neither be negotiable nor salable. According to the contention of the defendant, if the road were built a mile and a foot instead of a mile from Greensburg, or if only $249,999 instead of the stipulated $250,000 were spent in the county, not one cent need be paid on the bonds. Bonds of this sort would be of small advantage to a road in the process of construction.

We insist, therefore, it is apparent that none of these so-called conditions were conditions at all, and that for several reasons:

First, there is no clause of forfeiture. In other words, it is not said that a failure to expend the total amount subscribed in the limits of Green County, or a failure to locate and construct a railroad through the county of Green or within one mile of the town of Greensburg, should void the bonds. That this is not an oversight is apparent from the language used as to the further condition which we have discussed above, viz., in reference to the exoneration of Green County from the former subscription. This is stated in apt and clear terms: "Upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed." In other words, if it had been the intention of the instrument that neither the bonds nor the coupons should be paid until or unless the company should locate and construct the railroad through the county of Green and within one mile of the town of Greensburg, or expend the amount so subscribed within the limits of Green County, it would have been easy to say so.

Take the case of Provident Life & Trust Company v. Mercer County, 170 U. S. 594, where there was a similar condition. See the language there used. We read at page 594:

> "The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same,

at which time they shall be delivered to the said railroad company in payment for the subscription of such county."

In that case the bonds were put in the hands of a trustee. None of them were delivered until after the trustee had ascertained the performance of the condition, or at least said that he had so ascertained such performance.

Second, take the so-called condition that the railroad shall expend the amount so subscribed within the limits of Green County. It could not have been the intention of the parties that the railroad should spend the amount so subscribed until it got it. The county was given the right to pay the subscription in bonds. The only way that the railroad could get the money to expend it in Green County was to sell the bonds. The argument, therefore, comes to this: The very means which the railroad uses to perform the so-called condition is in and of itself a violation of the condition. In other words, the bonds, the proceeds of which the railroad is to expend in Green County, are not to be sold until their proceeds have been expended in Green County.

To construe this as a condition which would invalidate the bonds, therefore, defeats the very object of the so-called condition.

Third, the bonds were for the Cumberland & Ohio Railroad Company, and were to be used to pay the subscription. It is not said that the bonds were to be issued

upon condition that the railroad should be located and constructed through the county, or that the railroad company should expend the amount so subscribed within the limits of Green County, but as we read it, it was simply a subscription to the stock that was to be upon that consideration. The railroad, when it received the bonds, took them in payment of the subscription, and taking them in payment of the subscription, it must have been in contemplation of the parties that they would be disposed of to raise the money to accomplish what was the purpose both of the railroad and of the county, viz., the building of a line of road through Green County.

Fourth, to construe this as a condition would lead to absurd results: Thus, $150,000 of this money was spent in Green County; suppose that $249,000 had been spent and that the railroad had been built through Green County and within one mile of Greensburg; according to the argument, the bonds would be void.

Again, although $250,000 had been expended and the railroad built through Green County, yet if it had failed to come within one mile of Greensburg, the whole of the bonds would have been void.

Courts have been almost unanimous in construing provisions similar to these as covenants and not as conditions.

1 Cook on Stockholders, Sec. 78.
Chamberlain v. Paintsville & Hudson R. R. Co., 15 Oh. St. 225.

North Missouri R. R. Co. v. Winkler, 29 Mo. 318.
Swartwout v. Mich. A. L. R'y Co., 24 Mich. 389.
Pittsburg & Steubenville R. R. Co. v. Biggar, 34 Pa. St. 455.
Railroad v. Parks, 86 Tenn. 554.
Morrow v. Iron & Steel Co., 87 Tenn. 262.
McMillan v. Maysville & Lexington R. R. Co., 15 B. M. 218.
Miller v. Pittsburg & Connellsville R. R. Co., 40 Pa. St. 237.

A condition is not apportionable. In other words, it must be held that the non-fulfillment of any of these subsequent conditions in whole or in part avoided the entire issue of bonds, or that those provisions are not conditions at all, but are covenants.

In view of all these circumstances, we submit that it was plainly the intention of the parties that there should be one condition precedent, viz., the exoneration of the county from the former subscription; but all the other things which are called conditions were not conditions at all, but simply covenants upon the part of the railroad company. Being covenants upon the part of the railroad company, what is the effect of their breach?

We submit in the first place that it was not within the intention of Green County that the breach of these covenants should be pleaded against the bonds. The bonds were put into the hands of the railroad company in order that they might be sold, and it could not have been the intention of Green County that the subsequent failure of the railroad company to apply properly the money,

or the fact that some of the money was not properly applied, or the fact that there was not a full compliance with all of these covenants, should entirely avoid the bonds. But, in the second place (and this we submit is conclusive of this controversy), Green County has not alleged any damage growing out of the breach of these covenants. It has chosen to stand upon the pleading that these various covenants were conditions, the non-fulfillment of any one of which absolutely avoided the bonds. If it were to be conceded that, under the finding of fact that the plaintiffs, when they bought these bonds, knew that their proceeds had not been used in Green County (which, of course, they knew), or that the railroad had not been built through the county, this affected the purchaser with notice of the breach of the covenant, still, in the absence of some allegation by the county that this breach has damaged the county and to what extent it has so damaged it, there is no sufficient defense presented to this suit.

Now, the court finds that $150,000 of the proceeds of these bonds were used in Green County. It further appears that the railroad has been built to Greensburg. One of these covenants has, therefore, been fulfilled, and three-fifths of another of them has been fulfilled. This being the case, how can it be said that all of these bonds are absolutely void, and that Green County is entirely acquit of any obligation to pay any of these bonds or coupons?

The consideration for the issue of these bonds has, at the most, only partially failed. There has been by no means a complete failure; for, as noticed above, $150,000 of the money has been expended in doing the very thing which was designed, and five miles of the railroad has been built and the county seat reached. In the absence of any pleading upon the part of the defendant that the failure to perform the covenants entirely has damaged the county, we respectfully submit that the holders and owners of the bonds, who are expressly found to be *bona fide* and for value, are entitled to recover.

We respectfully submit, therefore, that the decision of the Circuit Court should be reversed, with directions to enter a judgment on the findings of fact in favor of the plaintiffs in error, as was done by the Circuit Court of Appeals.

Respectfully.

ALEXANDER P. HUMPHREY,

Of Counsel for Thomas and others.

ALEXANDER C. AYRES,

ALEXANDER P. HUMPHREY,

Counsel.

GREEN COUNTY, KENTUCKY, *v.* QUINLAN.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 351. Argued December 17, 18, 1908.—Decided January 4, 1909.

Findings of fact made by the Circuit Court which were not objected to and which accompanied the questions certified by the Circuit Court of Appeals, *held* in this case to be sufficient to justify entering judgment thereon after this court had responded to the questions certified.

The issuing of bonds in payment of a subscription to railroad stock by an officer, charged with the duty of ascertaining whether conditions precedent had been fulfilled, raises a presumption of their fulfillment and of the proper issuing of the bonds upon which a lawful holder of the bonds is entitled to rely until it is overcome by evidence to the contrary. In this case nothing in the findings overcomes such presumption.

In construing written instruments the entire instrument will be considered and not single words or phrases, and the intent reached even if technical meanings be disregarded; and so "on condition" interpreted as meaning a covenant or agreement.

Although county bonds may have been authorized "upon condition" that the railroad company assisted expend the proceeds as specified, if the condition is in fact merely a covenant or agreement, as in this case, the subsequent failure of the corporation to perform cannot be pleaded by the county against a *bona fide* holder for value.

In the absence of clearest proof coupon bonds intended for the market will not be presumed to have been issued under such conditions as would destroy their salability.

157 Fed. Rep. 33, affirmed.

THE facts are stated in the opinion.

Mr. Ernest Macpherson, with whom *Mr. John W. Lewis* was on the brief, for petitioner.

Mr. Edmund F. Trabue and *Mr. George Du Relle*, with whom *Mr. John J. McHenry*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Junior*, were on the brief, for respondent.

MR. JUSTICE MOODY delivered the opinion of the court.

The record and proceedings in this cause are in this court by virtue of a writ of certiorari issued to the Circuit Court of Appeals for the Sixth Circuit. The action was brought in the Circuit Court of the United States by Quinlan against Green County on certain bonds and coupons attached thereto, purporting to have been issued by Green County. The jurisdiction was based upon diversity of citizenship.

The petition alleged that the plaintiff was "the holder and owner" of the bonds named; that the bonds and coupons were duly executed and issued, were due and unpaid, and prayed judgment for their face value with interest.

The defendant filed a plea in abatement to the jurisdiction, alleging, in substance, that the plaintiff was not the real holder and owner of the bonds, and that the jurisdiction of the court was invoked fraudulently. Certain allegations contained in this plea were, on motion, stricken therefrom, and no exception was taken to the order. A reply to the plea was filed, denying its allegations. Thereupon it was agreed that the issues of law and fact should be tried by the court without a jury, and that the plea should be deemed a part of the answer, which was that day filed. In addition to the facts alleged in the plea the answer set up in defense (1) a denial of all the allegations of the petition; (2) that there was no consideration for the bonds; (3) that they were obtained by fraud; (4) that recovery upon some of the coupons was barred by the statute of limitations; (5) that the bonds were issued in payment of a subscription to the stock of the Cumberland & Ohio Railroad upon two conditions, namely, that the railroad should be constructed in a certain designated manner and that the county first should be exonerated from a prior subscription to the bonds of another railroad company, neither of which conditions had been performed. The plaintiff filed a reply, denying the allegations of the answer. There were further pleadings, which are unimportant here. After trial, the court rendered the following judgment: